

1
J. H. Jones



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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XXXIX.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 39 VICTORIA, TO TRINITY TERM, 40 VICTORIA
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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DURING THE PERIOD OF THESE REPORTS.

THE HON. ROBERT ALEXANDER HARRISON, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH.

EASTER TERM, 39 VICTORIA, 1876.

From May 17th to June 5th.

Present :

THE HON. ROBERT ALEXANDER HARRISON, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

CAMMELL V. THE BEAVER AND TORONTO MUTUAL FIRE INSURANCE COMPANY.

Insurance—Magistrate's certificate—Want of seal—Reasonable time.

The policy contained a condition requiring persons sustaining loss by fire to forthwith give notice thereof in writing, and as soon after as possible to deliver a particular account of the loss, stating various particulars specified; and in case of buildings or other fixed property, to accompany said statement by the certificate of a builder, &c. “They shall also produce a certificate under the hand and seal of a magistrate,” &c., “and *until* such proofs, declarations, and certificates are produced, the loss shall not be payable.”

Defendants, after setting out this condition in their plea, alleged that although the plaintiff, as soon as possible after the fire, made the statement of his loss and damage according to the condition, yet he did not as soon as possible after said fire, nor for more than eight months thereafter, produce to defendants such a certificate under the hand and seal of a magistrate, as required by the condition.

At the trial, it appeared that the fire occurred on the 19th April, 1874.

On the 10th May an affidavit of loss was sent in, accompanied by a certificate under the hand, *but not under the seal*, of a magistrate, and on the 4th January, 1875, a second certificate under the magistrate's seal was delivered to the company. The jury, under the direction of the Judge, having found for defendants on this plea,

Held, 1. That the condition requiring a seal was not unjust nor unreasonable.

2. That the words "as soon after as possible" did not apply to the magistrate's certificate, which was required to be produced only within a reasonable time.
3. *Semble*, that the question of reasonable time here, there being no facts in dispute, was for the Court; and under 37 Vic. ch. 7, sec. 33, the jury having found for the plaintiff on all the other issues, and the motion being to enter a verdict for the plaintiff on the evidence, the Court held that the second certificate was produced within a reasonable time, and entered the verdict for the plaintiff on this issue.

THIS was an action on a policy of insurance against fire.

The declaration averred that the defendants are a Mutual Fire Insurance Company, formed and incorporated under and by virtue of the several statutes in force in this Province, relating to mutual fire insurance companies: that by a policy of insurance, dated 1st April, 1873, after reciting that Rebecca R. Sanford, wife of John M. Sanford, had paid defendants \$5 for insuring against loss or damage by fire on a frame dwelling house in the policy described—it was declared that, subject to the conditions endorsed on the policy, the said Rebecca R. Sanford or her assigns should be paid out of the capital, stock or funds of the company, the amount of all such damage or loss, as she the said Rebecca R. Sanford, or her assigns, should suffer by fire in the property in the policy mentioned, (not exceeding \$500, the amount insured) from the 2nd May, 1873, until the 2nd May, 1877, at 12 o'clock noon: that Rebecca R. Sanford and John M. Sanford, her husband, for a valuable consideration, did, with the assent of the defendants, on the 1st May, 1873, assign to the plaintiff all of their interest in the policy of insurance: that after the making of the policy, and after the assignment thereof to the plaintiff, and while it was in force, the premises insured were burnt, damaged and destroyed by fire, whereby, &c., and all conditions, &c., were fulfilled: yet defendants had not paid plaintiff the amount of the said damage or loss.

The defendants pleaded the following among other pleas:

And for a third plea, the defendants say that the eleventh condition endorsed on the said policy, and to which the said policy was subject, as in the declaration mentioned, was as follows:—

Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to this company, and as soon after as possible, they shall deliver as particular account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just, shewing also what was the true nature of their title thereto at the time of the fire, whether any or what other insurances have been made on the same property, what was the whole cash value of the property insured; and when and how the fire originated, so far as they know or believe. And in case of buildings or other fixed property, they shall further accompany the said statement by the affidavit of a builder, or other competent person acquainted with the premises, shortly before their destruction, or damage, as to the value of the same at the time of the fire, to the best of his knowledge and belief; they must also produce a certificate *under the hand and seal* of a magistrate most contiguous to the place of the fire, and not concerned in the loss, nor related to the insured, stating that he has examined the circumstances attending the fire, damage, or loss alleged; and that he is acquainted with the character and circumstances of the insured or claimant; and that he verily believes that he, she, or they, have by misfortune, and without fraud or evil practice, sustained loss or damage on the property insured to the amount which the magistrate or notary public shall certify in his own words at length; and until such proofs, declarations and certificates are produced, the loss shall not be payable, &c. And the defendants say that the plaintiff, although as soon as possible after the fire, he made the statement of his loss and damage by the fire, according to the said conditions, yet did not as soon as possible after the said fire, nor until more than eight months thereafter, produce to the defendants such a certificate under the hand and seal of a magistrate, as is required by the said condition.

Issue.

The cause was tried at the last fall assizes for the county of Norfolk, before Wilson, J., and a jury.

The house insured was destroyed by fire on the 19th of April, 1874.

The affidavit of loss was made on the 11th May, 1874.

It was accompanied by a certificate of loss under the hand but not the seal of a magistrate, dated the 11th May, 1874.

These papers were delivered to the defendants on the 14th of May, 1874.

A second certificate of loss under the hand and seal of a magistrate, dated 4th January, 1875, was on that day delivered to the defendants.

Counsel for the defendants submitted that the third plea was proved.

The learned Judge left all the issues to the jury, and all, with the exception of the third issue, were found for the plaintiff, and \$500 damages. The third issue they found for the defendant.

During Michaelmas Term, November 18, 1875, *Beaty*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict as to the issue found on the third plea should not be set aside, and judgment *non obstante veredicto* entered for the plaintiff on said issue, and for the damages assessed; and why the verdict should not be entered thereon for the plaintiff, pursuant to the Law Reform Amendment Act; and on grounds disclosed in the evidence; and on the grounds that the verdict is against law and evidence, and pursuant to leave reserved; and on the ground that the plea affords no legal defence to the plaintiff's claim.

May 23, 1876. *J. H. Cameron*, Q. C., shewed cause. He referred to *Clarke* on Insurance 228, 229, 230.

Beaty, Q. C., contra. The words, "as soon as possible," do not apply to the certificate of the magistrate: *Columbia Insurance Co. of Alexandria v. Lawrence*, 10 Peters 507, 513. And the plea is no answer to the declaration: *Mann v. The Western Assurance Co.*, 17 U. C. R 190, 200; *Langel v. Mutual Ins. Co. of Prescott*, *Ib.* 524; *Lampkin*

v. *The Western Assurance Co.*, 13 U. C. R. 237; *Turley v. North American Fire Ins. Co.*, 25 Wend. 374; *Kerr v. British America Assurance Co.*, 32 U. C. R. 569. The condition is not a reasonable one: 36 Vic. ch. 44 sec. 33; 38 Vic. ch. 65, O.

June 29, 1876. HARRISON, C.J.—The condition requires that persons sustaining loss or damage by fire shall:

1. *Forthwith* give notice thereof in writing to the company.

2. *As soon as possible thereafter* deliver as particular an account of their loss and damage as the nature of the case will admit; signed with their own hands.

3. And *accompany the same* with their oath or affirmation, and declaring the account to be true and just, &c.

4. And in the case of buildings or other fixed property, to *accompany* the said statement with an affidavit of a builder or other competent person, &c., as to the value, &c., at the time of the fire.

5. Produce a certificate (not saying *when*) under the hand and seal of a magistrate most contiguous, &c. And provides that “*until* such proofs, declarations and certificates are produced *the loss shall not be payable*, &c.

The plea admits that the plaintiff “as soon as possible” after the fire made the statement of his loss and damage by the fire according to the conditions, but alleges that he did not “as soon as possible” after the fire, nor “until more than eight months thereafter,” produce to the defendant such a certificate under the hand and seal of a magistrate as is required by the condition.

The first question is as to the sufficiency of the plea. It assumes that the certificate under the hand and seal of the magistrate should be produced “as soon as possible” after the notice of loss, and that not having been so produced the plaintiff has lost his action in respect of the loss.

The contention on the part of the plaintiff is, that the condition is unreasonable, and that if reasonable there is no limit as to the time within which the certificate may be pro-

duced, so long as it is produced *at any time* before action.

The plea admits that the certificate, such as required by the policy, was produced *before* action.

The condition is clearly a condition precedent to the plaintiff's right to recover: *Routledge v. Burrell*, 1 H. Bl. 255; *Wood v. Worsley*, 2 H. Bl. 574; *Worsley v. Wood*, 6. T. R. 710; *Oldman v. Bewick*, 2 H. Bl. 577 *note*; *Mason v. Harvey*, 8 Ex. 819; *Kerr v. The British America Assurance Co.*, 32 U. C. R. 569; *Scott v. The Phoenix Assurance Co.*, 1 Stuart L. C. 354; *Roper v. London*, 5 Jur. N. S. 491.

It is as much necessary (by the terms of the condition) that the certificate should be under the seal as under the hand of the magistrate.

The case of *Mann v. Western Assurance Co.*, 17 U. C. R. 190, decides that the first certificate produced by the plaintiff in this cause was defective for the want of the seal, and not such a certificate as required by the condition.

Every condition endorsed upon or affecting any policy of insurance, held by the Court or Judge before whom any question relating thereto shall be tried not to be just and reasonable, is absolutely null and void: 36 Vic. ch. 44, sec. 33, O.

Such a condition as the one in question here was before the Act said to be a reasonable condition in the case of a Mutual Insurance Company: *Langel v. The Mutual Insurance Company of Prescott*, 17 U. C. R. 524, 528.

I cannot say, since the Act, that it is either unjust or unreasonable. It in effect appears as a just and reasonable condition among the conditions framed by the Judges under 38 Vic. ch. 65, sec. 2, O. See 39 Vic. ch. 24, schedule 12 *e*, O.

The necessity for a seal might well have been dispensed with by the company when framing the condition. It has been dispensed with by the Legislature in the Act to which I have last made reference. But I cannot say that it was either unjust or unreasonable for the

insurance company, when framing the policy, to require the formality of a seal. The law undoubtedly makes a difference between documents sealed and those which are not, and regards the former as acts done with more solemnity than the latter. I rejoice to know that the supposed distinction is gradually though slowly fading away. But when the formality is lawfully and expressly required in a statute, policy, or other writing, I cannot shut my eyes to the formality in all its bearings, merely because I deem it unimportant or merely because a hardship or failure of justice may be the consequence in the particular case of having regard to it. See *Rex v. The Inhabitants of Stoke Damerel*, 7 B. & C. 563; *Newry and Enniskillen R. W. Co. v. Edmunds*, 2 Ex. 118.

Besides, this policy was issued on 1st April, 1873. The fire took place on 19th April, 1874. The 39 Vic. ch. 24, O., was not assented to till 10th February, 1876, and only applies to policies thereafter entered into, or renewed, or otherwise in force in Ontario. See sec. 1.

The next question is, as to the time when such a certificate should, under the condition, be produced to the company.

The case of *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507, is applicable, and if sound law, decides that the part of the condition as to the certificate is not controlled by the words "as soon as possible."

The decision is not only that of the Supreme Court of the United States, but of one of the most eminent of the Judges of that Court, and one of the most eminent jurists of modern times—Mr. Justice Story.

In *Robinson v. Mollett*, L. R. 7 H. L. 802, 829, Baron Cleasby, referred to Mr. Justice Story as "one of the greatest writers on law, of a recent period."

The language of Mr. Justice Story in *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 513 is as follows:—

"It is contended on the part of the company: 1, That the certificate from a magistrate, here provided for, is to be

procured 'as soon as possible'; and that these words in the preceding clause are to be drawn down and construed to belong to the latter clause, so as to read, 'and shall, as soon as possible, procure a certificate,' &c.; and, 2, If this construction is not adopted, still that the certificate must be procured within a reasonable time; and that the procurement of it after five years from the time of the loss, is not a reasonable time. We are of opinion that the words, 'as soon as possible,' cannot be drawn down to fix the construction of the clause respecting the certificate. We think the true intent and meaning of it is, that the certificate must be procured within a reasonable time after the loss. It would be a most inconvenient course to adopt a different construction, not required by the terms of the clause or the context, as it would make the material enquiry, not the production of the certificate, but the possible diligence in procuring it."

If there be any difference between the words, "as soon as possible," and the words, "within a reasonable time," as applied to this policy, the decision of Mr. Justice Story shews that the defendants here have placed a wrong interpretation upon the condition of the policy, and for that reason without more, the plea would be bad.

But I am not convinced that there is any difference between the words "as soon as possible" and "within a reasonable time" as applied to this policy.

In general the words "as soon as possible" mean no more than "without unreasonable delay;" in other words, "within a reasonable time." *Atwood et al. v. Emery*, 1 C. B. N. S. 110; *Goodwyn v. Cheveley*, 4 H. & N. 631; *Mann v. The Western Ass. Co.*, 19 U. C. R., 314, 332.

The question now arises whether a delay of "more than eight months" is "without unreasonable delay;" in other words, "within a reasonable time." The allegation as to the period of time is so loose and indefinite as to make it very difficult to determine the case on the mere sufficiency of the plea.

Let us assume the delay to be for a year, and then turn to the authorities bearing on the point.

In the first place, the majority of the Court in *Mann et al. v. Western Ass. Co.*, 19 U. C. R. 314 held, approving the finding of the jury on the point that eleven months was not, under the particular circumstances of the case, an unreasonable delay ; and, in the second place, the Supreme Court of the United States in *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 514, on the face of the pleadings under the particular circumstances of that case, held that five years was not an unreasonable delay.

It is not easy to decide when the question of reasonable time is for the Judge and when for the jury.

In *Graham v. VanDieman's Land Co.*, 11 Ex. 101, 112, Coleridge, J., said, " that reasonable time, in the absence of any rule of law applicable to this particular subject, is a question for the jury, if there are facts for their consideration."

In an action against a sheriff for an escape, the question whether the officer was guilty of unreasonable delay in taking the party arrested to prison, was said to be one for the determination of the Judge: *Benton v. Sutton*, 1 B & P. 24, 28, per Heath, J. So the question whether an arrest had been countermanded within a reasonable time: *Scheibel v. Fairbain*, 1 B. & P. 388. So the question whether an executor had a reasonable time to remove the goods from the testator's mansion: *Co. Litt. sec. 69*.

On the other hand, questions affecting the ordinary course of trade and commerce, with which matter juries are supposed to be better acquainted than Judges, in cases where no definite rule has been fixed by the Legislature or by the course of judicial decision, the question of reasonable time is generally for the jury. See *Taylor on Ev.*, 6th ed., secs. 28, 29 and 30.

In *Goodwyn v. Cheveley*, 4 H. & N. 631, where cattle passing along a public highway, stray into an adjoining field through defect of fences, the owner of the cattle was bound to remove them within a reasonable time, and it was held, Bramwell, B. dissenting, in a very able judgment, that what is a reasonable time is not to be determined by the

Judge, but is a question for the jury with reference to all the surrounding circumstances.

In *Mann v. Western Assurance Co.*, 19 U. C. R. 314, 328, Mr. Justice Burns, in a dissenting judgment, said: "If the mere abstract question, whether omitting to furnish the proofs for eleven months after the fire, be one to be determined by the jury as one of reasonable time, yet the facts incorporated into this case, and not in dispute between the parties, in my opinion rendered the question one for the Court and not for the jury. But taking the question in the abstract, independent of the particular circumstances of the case, I still think the current of authority establishes, that in the majority of cases what constitutes reasonable time is a question for the Court, and not for the jury:—that is, *where there are no facts for their consideration.*"

Sir John B. Robinson, on the contrary, thought that it was proper for the learned Judge, under all the circumstances of the case, to have left that question to the jury, who found for the plaintiff, "for this is not a case in which the time can be said to have been fixed by any rule of law, or course of judicial decision," but that learned Judge added, "If it had rested with the Judge alone, I must say that I should be inclined not to pronounce on that point otherwise than as the jury did": *Ib.* 323, 324.

In the same case in appeal, Draper, C. J., was of opinion that the question of reasonable time had been properly submitted to the jury: *Ib.* 332.

The best solution of the difficulty that I have seen is that given by Mr. Justice Story in *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters, 507, 514, where he says: "In the ordinary course of things, upon a trial before the jury, this would be a mixed question of fact and law; of law, where all the facts and circumstances were admitted or established; of fact, where these circumstances were open for the ascertainment of the jury."

Such is the rule applied on the question of reasonable and probable cause, where, if there be no facts or inferences

from fact, in dispute, the question is one for the Court, and not for the jury: *Lister v. Perryman*, L. R. 4 H. L. 521.

In a case like the present, where there is no dispute as to the material facts, the question of reasonable time would appear to me to be one more proper for determination by the Court than by a jury, and as the motion before us is not simply for judgment *non obstante*, but to enter a verdict for the plaintiff on the evidence, we may, in disposing of the rule, refer to the evidence on the point. See *Mann v. The Western Assurance Co.*, 19 U. C. R. 314.

The fire was on the 19th April, 1874. The first certificate of loss, defective only apparently for want of seal, was delivered to the company on the 14th May, 1874, and the certificate properly signed and sealed, was delivered on the 4th January, 1875. If the latter certificate had been delivered on the 14th May, 1874, it is admitted that the delivery would have been in good time. The delay thereafter is less than eight months. I do not think on the facts, if the question be one for the Court, that this delay is unreasonable.

It is an ingredient in the consideration of the question to see whether the situation of either party has been altered by the delay. Per Cresswell, J., in *Graham v. VanDieman's Land Co.*, 11 Ex. 101, 111.

The delay is not shewn to have in any manner prejudiced the defendants. So far as I see, it alone prejudiced the plaintiff. I have no doubt that a jury, if the question of reasonable time were submitted to them, would not find the delay unreasonable under the circumstances, and I see no object in the present improved state of law procedure in further delaying the plaintiff by directing a new trial.

Every verdict is now to be considered by the Court in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given: 37 Vic. ch. 7. sec. 33.

Where there are no facts in dispute, and where the question on the facts is rather one for the Court than the

jury, the Court may properly avail itself of the provisions of this section, and so end litigation in a case where the jury has already determined all the other questions involved in favour of the plaintiff, and there is no doubt would, if this question had been submitted to them, have also determined it in favour of the plaintiff. See *Campbell v. Hill*, 23 C. P. 473.

I have the less hesitation in doing so in this case, where the effect of delay in the delivery of the certificate is not, according to the language of the condition, to defeat the claim but to postpone the recovery.

The provision is, that "*until* such proofs, declarations, and certificates are produced, *the loss shall not be payable.*" The delay in the procurement of the certificates is, in the language of Mr. Justice Story, in the case to which I have already referred, "not injurious to the company, but to the assured in depriving him of his right to judgment until they are procured."

This was certainly the reading of the condition adopted by the Court in that case, and also adopted by our Court of Queen's Bench in *Mann v. Western Assurance Co.*, 19 U. C. R. 314.

We are not bound by the former case except so far as its reasoning recommends it for our adoption, but the latter case being the decision of this Court is in itself binding authority on us, approved as it was by the then Court of Error and Appeal.

The rule on the construction of a policy of insurance is, where its language is doubtful, to read the policy most strongly against the company who prepared and issued it. See *Williamson v. The Hand-in-Hand Ins. Co.*, 26 C.P. 266.

Without invoking the aid of this rule, we may safely interpret this condition in like manner as Mr. Justice Story interpreted a similar condition in the United States decision, to which I have referred, and more particularly as his interpretation is in accordance with the opinion of so distinguished an authority in this Province as that of the late Sir John Beverley Robinson.

In our opinion the rule should be absolute to enter the

verdict for the plaintiff on the third as well as the other issues joined between the parties in this cause.

MORRISON, J., and WILSON, J., concurred.

Rule absolute.

CRAWFORD V. BEATTIE.

Action against J. P.—Information for false pretences—Form of—Objections to—Remand, liability for—Reasonable and probable cause.

The plaintiff was brought before defendant and another magistrate, on the 2nd of January, 1875, under a summons issued by defendant, on an information, that he did, on, &c., "obtain by false pretences from complainant the sum of five dollars contrary to law," omitting the words "with intent to defraud," which by the statute is made part of the offence, 32-33 Vic. ch. 21, sec. 93, D.

The prosecutor and another witness, T., were examined, and their statements shewed that the plaintiff sold some wood to the prosecutor, on a certain lot, telling him that some other parties had drawn it out, but that it was his, and if there was any trouble about it he would stand between the prosecutor and all danger: that the prosecutor paid him five dollars on account, and was afterwards prevented from drawing away the wood by one W., to whom T. swore it belonged; and that the plaintiff had offered to return the five dollars, which the prosecutor refused because the plaintiff would allow nothing for the use of his team. W. was absent, and the prosecutor asked for an adjournment, which was granted until the 5th. Defendant offered to take bail for plaintiff's appearance then, but the plaintiff refused to give it, saying "Send me to gaol," and defendant ordered the constable to take him into custody. The constable thereupon put him in the lock-up, which was not a proper place for the purpose, being very cold and uncomfortable, where he remained until the 5th. This constable, who acted as keeper of the lock-up, said defendant knew that prisoners remanded were confined there. On the 5th W. appeared and was examined as a witness. The case was adjourned until the 7th, the plaintiff giving bail for his appearance then, and on that day the magistrates, having in the meantime consulted the county attorney, dismissed the case. The plaintiff having sued the defendant for malicious arrest, and for false imprisonment:

Held, that there was no cause of action on either ground, and a nonsuit was ordered; for 1. The defendant had jurisdiction, for the information might by intendment be read as charging the statutable offence; and if not, the plaintiff should have taken his objection before the magistrate, when the information might have been amended and re-sworn; and he was precluded from raising it in this action.

2. There was upon the evidence no want of reasonable and probable cause for what defendant had done; for though what the prosecutor complained of was a breach of contract, and the subject of an action, it might also support a criminal charge; the remand under the circumstances was authorized; and that there was no proof of malice.

3. *Held* also, that the defendant could not be held liable for the plaintiff's sufferings caused by the condition of the lock-up, for he had remanded him only, giving no express directions to put him there.

DECLARATION. First count: that the defendant as and then being a justice of peace, in and for the county of Huron, took the information of William Lee, the younger, against the plaintiff, for "having on or about 1st December, 1874, obtained from the said William Lee, the younger, by false pretences, the sum of five dollars, contrary to law": that the defendant, as and being such justice, issued a summons under his hand and seal, directed to the plaintiff, whereby the plaintiff was commanded to appear on 2nd January, 1875, before the defendant, the said justice, or such other justices of the peace for the county of Huron as might be there, to answer to the complaint: that the defendant, as and being such Justice as aforesaid, on 2nd January, 1875, after hearing the evidence then adduced against the plaintiff, unlawfully, wilfully, and maliciously, and without any reasonable or probable cause, assaulted the plaintiff, and gave him into the custody of a constable, and caused him to be imprisoned in the common prison of the town of Seaforth, for the space of three days, &c.

The second count was substantially the same as the first.

The third count was, generally, for assault and false imprisonment.

Plea not guilty by statute, Consol. Stat. U. C. ch. 126, secs. 1 to 20, inclusive, a public Act.

Issue.

The case was tried, with a jury, at the last Fall Assizes, at Goderich, before Hughes, Co. J., sitting for and at the request of Richards, C. J.

The information was proved. It was that of William Lee, junior, of the township of McKillop, who swore that "John Crawford, shoemaker, of Seaforth, did, on or about the first day of December, 1874, obtain by false pretences from complainant, the sum of five dollars, contrary to law."

It was sworn on 31st December, 1874, before the defendant.

On this information, the defendant caused a summons to be issued to the plaintiff to appear on 2nd January, 1875,

at 10 o'clock in the forenoon, at Seaforth Market Building, before the defendant or such justices of the peace as might then be there, to answer to the information, and to be further dealt with according to law.

The plaintiff appeared before the defendant on the summons. He was at the time a little the worse of liquor, and conducted himself in a manner somewhat offensive.

The defendant explained to him that the charge was for misdemeanour, and that he, the defendant, had no power to dispose of it summarily.

The prosecutor, and a witness called McTaggart, were on 2nd January, 1875, examined on behalf of the prosecution.

The prosecutor swore that on 1st December, 1874, the plaintiff said he had some wood to sell on the twelfth concession of Hibbert, that he wanted \$1 per cord for the wood: that he said some other parties had drawn out the wood, but the wood was his, and if there were any trouble about it he would stand between the prosecutor and all danger: that the prosecutor and the plaintiff thereupon went and measured the wood, and the prosecutor then paid plaintiff \$5 on account of the wood, promising to pay the balance when he should draw the wood away; that afterwards he endeavoured to draw away the wood, but was prevented by some parties, who said plaintiff never owned the wood and had no right to it.

The prosecutor also stated that the plaintiff, on an application being made to him for repayment of the \$5, said he might sometime repay it, and some time afterwards did offer to the prosecutor the \$5, but as the plaintiff refused to allow the prosecutor anything for the use of the team, the latter refused to accept the \$5 so offered.

Sylvester McTaggart swore that he was living on lot 25, in 13th concession of Hibbert: that he was one of "the heirs to the lot": that he was in possession of the lot with the consent of his eldest brother: that he had been on the place for eighteen months, paying no rent for the use of the place: that he sold Thomas Wren a quantity of

timber in the bush on the lot: that the latter made it into wood, and drew it off the lot on to the highway: that the prosecutor and plaintiff afterwards measured the wood on the highway, and that the wood belonged to Thomas Wren, who prevented its removal.

The prosecutor, owing to the absence of Thomas Wren, his principal witness, was not prepared to go on further, and asked for an adjournment, which was granted by the defendant and another magistrate who presided with him at the request of the plaintiff.

The constable said he could not have the witness in attendance before the Tuesday following, at four o'clock.

The adjournment was till that day.

The magistrates offered to take bail for the plaintiff, himself in \$200, and two sureties in \$100 each.

Two persons were present who offered to become plaintiff's sureties, but he refused to give bail, saying that he would "go to gaol like a man," and kept saying, "Send me to gaol!" "Send me to gaol!"

The defendant told him that the magistrates were not to be "bullied," and that he must either give the required bail, or remain in custody.

The plaintiff still refused to give the bail, and so defendant ordered the constable to take the plaintiff into custody.

The constable placed the defendant in the lock-up at Seaforth. The lock-up was a very uncomfortable place. There was no furniture in it except a bench and a straw palliass, and a straw cushion. There were no bed clothes, although the night was very cold. The plaintiff's wife took him some blankets and pillows; she also took him some supper, but he refused all, saying he would die before he would eat the supper. The constable stayed with him till 10 o'clock, and offered him bed clothes, but he still refused them. He pitched out the bed clothes, saying he would "freeze" and "die there."

The constable again visited him at 8 o'clock on Sunday morning, put on a fire, and allowed the plaintiff, who appeared to be very cold, to warm himself at the stove of

the council chamber near by. His wife provided him with breakfast. She took dinner to him at 1 o'clock; she also took his tea to him in the evening, and stayed with him till 10 o'clock on Sunday night.

The constable put in a good fire before he left, but as the building was a wooden one, not plastered inside, but boarded with tongued and grooved stuff outside, and battened on top, it was in winter very cold, and difficult to be heated.

On the Sunday morning plaintiff said he was sorry he had not given the bail, and asked for and obtained the bed clothes, &c.

The plaintiff's wife regularly gave him his meals on Monday, as she had done on Sunday.

On Tuesday, 5th January, 1875, the Court met pursuant to adjournment.

Thomas Wren was then examined as a witness. He swore that he purchased a quantity of wood from Sylvester McTaggart off the lot: that the latter marked out a piece of the lot, and sold witness all the timber that was on it, except some rail timber, which he reserved: that he, witness, gave McTaggart a set of double harness for the timber: that the harness was worth about \$10: that he cut most of the timber and drew it to the highway: that he afterwards learned that the plaintiff had sold his wood, and when the prosecutor came for the wood, prevented its removal by him.

This concluded the testimony for the prosecution.

The magistrates, at the conclusion of it, adjourned the further hearing until Thursday, 7th January, 1875, at 4 o'clock p.m., for the purpose, in the meantime, of consulting the County Crown Attorney. They accepted bail for the appearance of the plaintiff, himself in \$100, and one surety in \$50. The plaintiff on this occasion gave the bail without hesitation.

On Thursday, 7th January, 1875, the County Crown Attorney having been in the meantime consulted, the magistrates decided to dismiss, and did dismiss the charge, with costs.

Messrs. McCaughey & Holmested, attorneys for the plaintiff, on 10th February, 1875, wrote a letter to the defendant advising him of instructions from the plaintiff to bring an action, and asking for a settlement.

The answer of the defendants was as follows :—

“Seaforth, 11th February, 1875.

“Messrs. McCaughey & Holmested, Barristers, Seaforth—

“Your friendly note of yesterday to hand, and contents noted. I cannot entertain the idea for a moment that your firm have any feelings towards me but what are friendly, as far as I am aware of ; at least you could have no possible desire to see me put to the expense of a lawsuit with a man of straw, and whose present occupation seems to be loafing around the bar-rooms of this town drinking whiskey. You state in your note that unless this matter is settled by Friday 1st, you will commence proceedings. Well, I do not know what sort of proceedings you intend to commence against me, but I promise you, as far as I am concerned, it will not be settled, as I do not know what I have to settle. I have given the matter my serious attention, and have come to the conclusion that you are either joking with me, or that you are helping the party referred to to levy blackmail on me, which I cannot stand, as I have no spare funds at present for that purpose. In the matter referred to, I consider that I done my duty and nothing more, and must enter the plea of not guilty. As you and I are friendly, and I can speak as to a friend, I would advise you to secure your costs before you begin, as there is no costs for you; as far as I am concerned. I do not like law, but I will not settle an imaginary affair of this kind without the least foundation to rest upon. If you go on, as far as your firm and I am concerned, let us be friendly and fight for the right. I know if you do that, you will not make much of a fight, as there is no right on your side of the question. So, good bye. I hope that we will yet meet in a better country than this, where there will be no lawsuits.

“JOHN BEATTIE.”

Notice of action was served on the defendant on 19th February, 1875.

The action was commenced on 25th June, 1875.

The plaintiff was examined as a witness in his own

behalf. He did not shew any right to sell the wood, beyond the fact that the land belonged, as he swore, to his wife. He swore he had consulted Mr. Cameron, of Goderich, and the latter advised that he had the right to do so.

He also swore that the magistrate refused to hear any evidence for the defence, although evidence for the defence was tendered.

He admitted that for several years he had himself been a magistrate, and acted as such.

At the close of the plaintiff's case a nonsuit was asked on the following, among other grounds:—

1. That the whole of the allegations in the declaration were not proved.

2. There was no proof of malice, and want of reasonable and probable cause.

3. The defendant did no more than he had a right to do as a magistrate.

4. In the absence of a warrant committing plaintiff to the lock-up, or a direct command or order given to the constable by the defendant to detain the plaintiff in the lock-up, defendant is not responsible for imprisonment therein.

The learned Judge refused to nonsuit, but reserved to the defendant leave to move to enter a nonsuit or verdict for the defendant on the objections.

The defendant was then called as a witness. He swore he had not the slightest feeling towards the plaintiff: that he and the plaintiff were strangers: that he simply ordered the plaintiff into the custody of the constable: that he did not commit him to the lock-up: that he had no desire except to do his duty as a magistrate: that he had been a magistrate for seven years: that the cells in the lock-up were used for the keep of prisoners, when he had on previous occasions remanded prisoners: that he had been trying to get the county council to put the lock-up in a proper condition: that it was not a proper place for the confinement of prisoners: that although the evidence against the plaintiff was slight, he, defendant, thought from his manner that he was guilty: that he did not, however, think

the evidence sufficient to convict him, and so, after consultation with the County Crown Attorney, dismissed the charge.

Alonzo Strong, the other magistrate, was examined as a witness for the defence, and corroborated the evidence of the defendant.

The constable who made the arrest was also examined as a witness for the defence. He swore that when prisoners are remanded by defendant, he knew they were confined in the lock-up.

This closed the testimony for the defence.

Counsel for the defence renewed his objections, and asked the Judge to rule that there was no evidence to go to the jury of malice in support of the first and second counts, and as to the third count, that the defendant was acting within his jurisdiction.

The learned Judge again refused to nonsuit. He considered the facts disclosed were such that he could not withdraw the case from the jury on the question of malice alleged in the first and second counts. He ruled that if a case were disclosed before the magistrates which would justify the detention of the plaintiff, trespass would not lie: that although nothing was done by the defendant which would justify the bringing of the action up to the examination of the plaintiff on Saturday, still defendant was responsible for illegal acts after the plaintiff's person was detained, and his liberty interfered with illegally, and for all that followed.

The learned Judge then recalled the constable to ask him if he were the keeper of the lock-up. The constable in answer said, that the person appointed to act as keeper had not acted for some time past, but that he, the constable, had acted as such for some length of time, with the knowledge of defendant.

The learned Judge then directed the jury that, in the absence of a sworn information charging an intention to defraud, there was no reasonable or probable cause for arresting the plaintiff on a warrant in the first instance,

but as no such warrant was issued, and there was only a summons, no action would lie for that. But after the evidence was taken upon the charge, and reading it in a way most favourable to the defendant, the learned Judge held there was absence of reasonable and probable cause, because, as he said, there was nothing disclosed from which it could be inferred that the plaintiff had done more than commit a breach of warranty, for which he would be liable to a civil action only, and that there was nothing from which it could be inferred that the plaintiff, when he obtained the \$5, had any intention to defraud, for there was a clear allegation of the probability of a claim being set up by another to the wood sold, and a promise by the plaintiff to indemnify the purchaser, Lee, who had paid the \$5 on its purchase, and a subsequent offer by plaintiff to return the \$5 when the claim had been set up; and that these facts coming from the evidence of Lee, the prosecutor, made an absence of reasonable and probable cause of any indictable misdemeanour having been committed, so as to justify the detention of the plaintiff in custody.

He also directed the jury that besides the want of reasonable and probable cause, it was necessary for the plaintiff to prove malice, telling the jury the difference between malice in fact and malice in law, and ruled that there was evidence from which the jury might infer malice, referring to the evidence in detail.

He left it to the jury to find as a fact whether it was the act of the defendant that the plaintiff was confined in the lock-up, directing them, that if it were the act of the constable only the jury should not hold defendant responsible for what the plaintiff suffered in the lock-up, or give any damages on that account, but only for his detention in the custody of the constable without reasonable or probable cause.

The learned Judge, as to the third count, told the jury that all that was disclosed in the evidence before the magistrates was a breach of warranty, and not a crime or indictable offence: that the defendant had no jurisdiction,

and for want of jurisdiction was liable to an action of trespass for false imprisonment, and that there was no justification of it proved.

Counsel for the defendant objected to the charge.

The jury rendered a verdict for plaintiff, \$350 damages.

During Michaelmas term, November 18, 1875, *S. Richards*, Q. C., obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial; or why a new trial should not be had between the parties, on the ground that the verdict is against law and evidence, in this, that there was no evidence or sufficient evidence of want of reasonable and probable cause, or of the malice alleged in the first and second counts; and that the defendant had jurisdiction and authority in the case, and is not liable in trespass for what he authorized or directed to be done: that the defendant was not liable for the acts of the constable in putting the plaintiff in the lock-up, the same not being authorized or directed by the defendant; and that on the facts disclosed at the trial, the defendant was entitled to a verdict; and also on the ground of misdirection of the learned Judge, in telling the jury that the defendant had no jurisdiction, and for want of jurisdiction was liable to an action of trespass for false imprisonment; and also in telling the jury that there was no justification proved.

During Hilary term, February 23, 1876, *C. Robinson*, Q. C., shewed cause. The information did not, in the absence of the words "with intent to defraud," disclose an indictable offence over which the defendant had jurisdiction: 32-33 Vic. ch. 21, secs. 93, 110, D.; 32-33 Vic. ch. 29, Sch. A., p. 290; 32-33 Vic. ch. 30, secs. 9, 10, 11; *Roscoe Crim. Ev.*, 8th ed., 494. The objection is one of substance and not of form: *Martin v. Pridgeon*, 1 E. & E. 778; *Regina v. Shaw*, 12 L. T. N. S. 470; *Connors v. Darling*, 23 U. C. R. 541; *Caudle v. Seymour*, 1 Q. B. 889, 892; *Friel v. Ferguson*, 15 C. P. 584; *Appleton v. Lepper*,

20 C. P. 138; *Add. Torts*, 600-1, ed. 1876. The evidence does not disclose any offence: *Lawrenson v. Hill*, 10 Ir. C. L. R. 177, 184; *Add. Torts*, 681, last ed. There was no jurisdiction, therefore, and so trespass is maintainable; but if there was jurisdiction, the evidence shews a want of reasonable and probable cause and malice.

S. Richards, Q. C., contra. The plaintiff not having raised any objection to the information before the magistrate, waived all objection, and there being general jurisdiction over the offence intended to be charged, the plaintiff is now as much bound as if the information were in all respects correct: 32-33 Vic. ch. 30, secs. 1, 2, 11. But whether or not, there is no difficulty in supporting the information as intending to charge the statutable offence, and as such intendment would, in this case, be only reasonable, there is jurisdiction as well over the person as the offence: *Barton v. Bricknell*, 13 Q. B. 393, 396; *Appleton v. Lepper*, 20 C. P. 138; *Connors v. Darling*, 23 U. C. R. 541. If there was jurisdiction, it was a question for the magistrate whether there was the intent to defraud, and the evidence does not negative that intent: *Arch. Crim. Pl.* 473, last ed.; *Regina v. Abbott*, 1 Den. C. C. 273; *Regina v. Burgon*, 1 Dear. & B. 11; *Regina v. Meakin*, 11 Cox 270; *Regina v. Kenrick*, 5 Q. B. 49. And under the circumstances the magistrate was justified in remanding as he did: 32-33 Vic. ch. 30, sec. 41, 42, D.; *Gelen v. Hall*, 2 H. & N. 379; *Oke's Mag. Synopsis*, vol. i. p. 108, ed. 1868; *Cave v. Mountain*, 1 M. & G. 257; *Mills v. Collett*, 6 Bing. 85.

May 15, 1876. HARRISON, C. J.—The conduct of the plaintiff in this cause while before the defendant, considering that he himself was at one time a magistrate, is not at all to his credit.

The action which he has brought is, on the facts proved, vexatious, and the defendant should, if possible, be protected against such an action.

No liability to action can arise in the exercise of judicial functions from a mistake of fact, or erroneous application or interpretation of law, where the question is not one of jurisdiction: *Bott v. Ackroyd*, 7 W. R. 420; *Sommerville v. Mirehouse*, 1 B. & S. 652; *Sprung v. Anderson*, 23 C. P. 152; *McDonald Stuckey*, 31 U. C. R. 577.

If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend on the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation. Per Tindal, C. J., in *Cave v. Mountain*, 1 M. & G. 262. See further *Windham v. Clere*, Cro. Eliz. 130; *Lowther v. Earl Radnor*, 8 East. 113; *Pike v. Carter*, 3 Bing. 78; *Mills v. Collett*, 6 Bing. 85; *Ashcroft v. Bourne*, 3 B. & Ad. 684; *Coster v. Wilson*, 3 M. & W. 411; *Regina v. Dodson*, 9 A. & E. 704.

The test of jurisdiction is, whether or not the magistrate had power to enter upon the enquiry, not whether his conclusions in the course of it are true or false: *Regina v. Bolton*, 1 Q. B. 66. See further *Thompson v. Ingham*, 14 Q. B. 710; *Regina v. Dayman*, 7 E. & B. 672; *Chivers v. Savage*, 5 E. & B. 697; *Regina v. Levi*, 31 L. J. M. C. 174; *Ex parte Vaughan*, L. R. 2 Q. B. 114; *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417; *Regina v. Adamson*, L. R. 1 Q. B. D. 201.

In *Mills v. Collett*, 6 Bing. 85, the Court held that the magistrate was not liable to an action of trespass for committing a party to prison upon a charge of felony, under 7 & 8 Geo. IV. ch. 30, sec. 19, for cutting down a tree, although it appeared on the face of the depositions under which the party was committed, that such party was himself the occupier of the land on which the tree grew.

And per Tindal, C. J., at p. 92, "If a party charged with an offence be brought before a magistrate, he must exercise a judgment in the case, and he is not liable for a mere error of judgment."

And per Burroughs, J., at p. 93, "If the magistrate has

jurisdiction as he had here, he never can be liable in an action of trespass, nor in any form of action for a mere mistake on a matter of law; and whether an occupier could commit a felony under the statute on his own premises, was clearly a matter of law."

The information in *Mills v. Collett* charged the party with having committed a felony within the terms of the statute, namely, as "having wilfully and maliciously cut, broken, barked, rooted up, or otherwise destroyed a timber tree, growing in a yard belonging to a dwelling house, of the value of one pound and upwards," the property of Dr. B., and was silent as to the occupation of the land which was only disclosed by the depositions.

The magistrate therefore clearly had jurisdiction, though he may not have exercised that jurisdiction very wisely in committing a party to prison (where he was confined three months among felons), upon a charge negatived by the evidence adduced for the purpose of supporting it, and which evidence was before him at the time he signed the warrant of commitment: *Cave v. Mountain*, 1 M. & G. 264, note.

Such matters are now to a great extent regulated by the well-known statute, Consol. Stat. U. C. ch. 126, intitled, "An Act to protect Justices of the Peace and other officers from vexatious actions," taken from the English statute, 11 & 12 Vic. ch. 44.

It is enacted by section one, that, "Every action brought against a Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, * * whether any of such duties arise out of the common law or be imposed by Act of Parliament, either Imperial or Provincial, shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause," &c.

It is enacted by section two of the same Act, that "For any act done by a Justice of the Peace in a matter of

which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, * * any person injured thereby may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause."

The first and second counts of the declaration in this cause are based on the first section, and the third count on the second section of this statute.

The learned Judge who tried the cause ruled that the defendant had no jurisdiction, and so was liable to an action of trespass, and "for all that followed;" and that if there were jurisdiction, there was a want of reasonable and probable cause, and evidence of malice, and so there was evidence to sustain the first and second counts of the declaration. If there were misdirection in any of these particulars there must be a new trial, for misdirection—if in all of them, a nonsuit ought to be entered.

The first question is, whether the learned Judge was right in ruling that there was no jurisdiction, and so that the third count of the declaration was sustainable. It is now settled that the jurisdiction of the justice of the peace depends not merely on jurisdiction over the subject matter, but jurisdiction over the individual arrested: *Caudle v. Seymour*, 1 Q. B. 889, 892. See also *Connors v. Darling*, 23 U. C. R. 541; *Appleton v. Lepper*, 20 C. P. 138.

No one disputes the power of a magistrate to investigate a criminal charge of obtaining money under false pretences with intent to defraud; but in order to give jurisdiction there must be either an information for a criminal offence: *Rex v. Fuller*, 1 Ld. Raymon. 509, *Rex v. Birnie*, 1 M. & R. 160; *Caudle v. Seymour*, 1 Q. B. 889; *Friel v. Ferguson*, 15 C. P. 584; *Appleton v. Lepper*, 20 C. P. 138,—or the information be waived by the accused: *Regina v. Shaw*, 12 L. T. N. S. 470, 473; *Turner v. Postmaster General*, 5 B. & S. 756; *Regina Fletcher*, L. R. 1 C. C. 320.

The rule certainly is, that matters of form must be as

strictly observed in summary convictions as in indictments : See *Ex parte Pain*, 5 B. & C. 251. But I am not aware that this rule has ever been strictly applied to informations.

Informations before magistrates must be taken as nearly as possible in the language used by the party complaining. See *Cohen v. Morgan*, 6 D. & R. 8 ; *McNellis v. Gartshore*, 2 C. P. 464.

If by reasonable intendment the information can be read as disclosing a criminal offence, the rule is so to read it. See per Monahan, C. J., in *Lawrenson v. Hill*, 10 Ir. C. L. R. 177.

An information charging the plaintiff with having unlawfully taken away a pair of shutters belonging to the plaintiff, and having converted the same to his own use against the form of the statute, does not charge a felony : *Tempest v. Chambers*, 1 Stark. 67.

An information charging that the plaintiff did "abstract from the table, in the house of John Evans, a paper being a valuable security for money," does not charge a felony : *Smith v. Evans*, 13 C. P. 60.

An information that "the said Ellen Kennedy has the key of a house in her possession, the property of the complainant, and would not give it up" to the complainant's agent, contains nothing which by reasonable intendment can be construed as charging criminality : *Lawrenson v. Hill*, 10 Ir. C. L. R. 177.

An information which stated that A. B. had neglected to return a gun which had been lent to him, and for which he had been repeatedly asked, was not construed as charging criminality : *McDonald v. Bulwer*, 11 L. T. N. S. 27.

The old rule was to the effect, that evidence would not be allowed to supply omissions in the information, "for the office of the evidence is, to *prove*, not to *supply* a legal charge." See *Rex v. Wheatman*, Doug. 345 ; *Wiles v. Cooper*, 3 A. & E. 524, 528 ; *Carpenter v. Mason*, 12 A. & E. 629.

But it is now, by 32-33 Vic. ch. 30, sec. 11, declared that "no objection shall be *taken or allowed*" to any information or complaint; —

1. For any "alleged defect therein in substance or in form."

2. Or for "any variance" between it and the evidence adduced on the part of the prosecution, before the justice or justices who take the examination of the witnesses in that behalf.

This statute, which is the same as the English statute 11 & 12 Vic. ch. 43, sec. 1, is, according to its language, framed not only to meet the case of a variance between the information and the evidence—See *Whittle v. Frankland*, 5 L. T. N. S. 639—but to cure defects in the information, either "in substance or in form," where the evidence discloses an offence.

Still it does not enable the justice to summon a person for one offence, requiring a particular punishment, and, without a fresh information, convict him of a different offence, requiring a different punishment: *Martin v. Pridgeon*, 1 E. & E. 778; *Soden v. Cray*, 7 L. T. N. S. 324; *Regina v. Brickhall*, 10 L. T. N. S. 385.

The offence created by statute is obtaining money &c. by false pretences, with intent to defraud: 32-33 Vic. ch. 21, sec. 93 D.; *Ib.* ch. 29, Sch. p. 290.

An indictment omitting the words "with intent to defraud," would be bad on motion in arrest of judgment. See *Rex v. Rushworth*, 1 R. & R. 317. See also *Roscoe's* *Crim. Ev.* 8th ed. 494.

But it is not every objection which would be good on a motion to quash, or on a demurrer that is good after a decision or verdict.

A man accused of crime before a magistrate who raises no objection to the form of the information, and is tried and convicted, is under the operation of 32-33 Vic. ch. 30, sec. 11 much in the same position as a man indicted for crime, who omits to demur to or quash the indictment, pleads not guilty, is tried, and convicted.

Where there is any defect imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without

which it is not to be presumed that either the Judge would direct or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law. See note to *Stennel v. Hogg*, 1 Wms. Saund. 260.

There is no distinction in this respect between civil and criminal cases. See *Rex v. Warshaner*, 1 Moo. C. C. 466; *Heyman v. The Queen*. L. R. 8 Q. B. 102; *Regina v. Goldsmith*, L. R. 2 C. C. 74.

It is not necessary in an information or conviction to use the actual words of the statute, provided those used are equivalent: *Stamp v. Sweetland*, 2 New Sess. Cas. 90.

The information here is, that the accused did on, &c., obtain by false pretences from complainant the sum of \$5, contrary to law.

The question is, whether the charge of obtaining money by false pretences with intent to defraud, is not by reasonable intendment shewn on the face of this information.

In ordinary parlance we speak of obtaining money or property by false pretences, as indicating the criminal offence of obtaining the same by false pretences with intent to defraud. All the clauses as to false pretences in the statute 32-33 Vic. ch. 21, D., are under the heading "As to obtaining money, &c., by false pretences."

It seems to me that this information may, without contravening any of the decided cases, by intendment be read as importing the statutable offence of obtaining money by false pretences, with intent to defraud.

But if the information be not technically sufficient without the words "with intent to defraud," I do not think the plaintiff should in this action, under the circumstances proved, be permitted to question the form of the information.

The plaintiff, when before the magistrate, did not pretend ignorance of the charge. He should then, if intending in any manner to take advantage of the information "for defect of substance or of form," to have urged the objection. Had he done so, the information might have

been amended and re-sworn. Not having done so, it would be contrary to the plain intent and language of sec. 11 of 32-33 Vic. ch. 30, D., in such a case as the present, to allow it to be now successfully taken.

In my opinion, there was jurisdiction to enquire into the offence, and during the course of the enquiry, from time to time, to amend, and ultimately to dismiss the charge or commit the accused.

This conclusion renders unnecessary any decision on the other points raised during the argument, except with a view to the question of nonsuit. But I cannot omit to say that, in my opinion, the defendant ought not on the evidence given at the trial to be held liable for the sufferings of the plaintiff, owing to the improper condition of the lock-up. The evidence does not shew that defendant committed the plaintiff to the lock-up. See 32-33 Vic. ch. 30, sec. 41, Sch. Q. 1. The defendant did no more than remand the plaintiff. The remand, so far as appears by the evidence, was not to any particular place of imprisonment. The constable might either have taken the plaintiff to the gaol at Goderich, or to the lock-up. He did the latter. In the absence of any direct order from the defendant to the constable to take the plaintiff to the lock-up, and detain him there, it cannot be held that the defendant is responsible for the state of the lock-up.

A similar point arose in *Cave v. Mountain*, 1 M. & G. 257, 264. Platt called the attention of the Court to the severe restrictions to which the plaintiff had been subjected during his imprisonment; the defendant as one of the visiting magistrates being aware of the harshness of those restrictions, to which it was answered by Tindal, C. J., "that as the defendant had given no *express direction* on the subject, that made no difference."

Besides, one cannot shut his eyes to the fact, that the suffering which the plaintiff endured was to a large extent self-imposed. He churlishly refused to give bail, and preferred, as a matter of choice, to go to gaol "like a man." He went like a man, and suffered like a martyr. But having,

as it were, voluntarily done so, he ought not to be allowed to make merchandize of his suffering, and sell it for the highest price.

Committing magistrates have nothing whatever to do with the condition of lock-ups. Unfortunately there are places of imprisonment, like court-houses, in this Province, not always what they ought to be. But the responsibility at present rests on the municipal bodies who have the control of them. It is, or ought to be, the duty of the Executive Government to see that this control is properly exercised. If the Government have not the power, the law is defective and ought to be amended. The laws of health, humanity, and decency alike demand that such buildings as those mentioned should be fit for the purpose for which they are designed.

The charge that the defendant was responsible "for all that followed" the remand, cannot be sustained.

Besides, I am unable to concur in the ruling of the learned Judge to the effect, that there was a want of reasonable and probable cause.

Though many breaches of contract may be of such a nature as to be the subject of an action, and not of any criminal proceeding, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud. Per Denman, C. J., in *Regina v. Kenrick*, 5 Q. B. 49, 65.

The mere fact that there is a promise or a covenant for title, is no reason why the person who, by means of a false and fraudulent representation, obtains money, should not be prosecuted and punished criminally: *Regina v. Meakin*, 11 Cox 270.

If, when the plaintiff represented himself as owner, he knew he was not owner, or believed he was not owner, and made the false representation in order to induce another to part with his money, the fact that he promised the other to indemnify him against the claims of third parties, does not, as a matter of law, free the plaintiff from the accusation of crime.

I, as a Judge, cannot say that when the defendant remanded the plaintiff, he, as a magistrate, drew a wrong conclusion from the facts.

In an action for malicious prosecution, although the question of reasonable and probable cause is an inference to be drawn by the Judge from the facts, undisputed or found: *Lister v. Perryman*, L. R. 4 H. L. 521—yet the test is not what impression the circumstances would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in following up the proceedings: *Kelly v. Midland R. W. Co.*, 7 Ir. R. C. L. 8.

If, from the absence of witnesses, or from any other reasonable cause, it becomes necessary or advisable to defer the examination, or further examination of the witnesses, for any time, the justice before whom the accused appears may, by warrant, from time to time, remand the party accused for such time as by such justice, in his discretion, may be deemed reasonable, not exceeding eight clear days at any one time, to the common gaol in the territorial division for which such justice is acting: 32-33 Vic. ch. 30, sec. 41.

I am unable to say that there was an obligation on the magistrate to adjudicate in favour of the plaintiff after hearing the witnesses examined on the first day, and without hearing the testimony of the principal witness not then in attendance.

If this be so, his omission to adjudicate is not to be deemed want of reasonable and probable cause.

The defendant offered to take bail for the appearance of the plaintiff, but this was obstinately refused.

The committal of the defendant properly followed the decision to remand till a future day, not exceeding eight clear days. See *Lock v. Ashton*, 12 Q. B. 871.

I entirely fail to see the want of reasonable and probable cause, and have therefore arrived at the conclusion, that on the whole case a nonsuit must be entered.

There is no complaint as to the direction of the learned Judge on the question of malice, but holding, as I do, that

there was no proof of want of reasonable and probable cause, I must also hold that there was no evidence of malice.

It is true that the term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives: Per Parke, J., in *Mitchell v. Jenkins*, 5 B. & Ad. 588, 595. And that when there is no reasonable and probable cause, the jury may infer malice from the facts: *Ib.*

In this case there was, in my opinion, no evidence whatever of malice, and there being no proof of want of reasonable and probable cause, it was not open to the jury to infer malice from the facts.

Unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in the execution of that duty, unless he can be fixed with malice: per Lord Denman, in *Linford v. Fitzroy*, 13 Q. B. 247.

It cannot in this case be said that there was any wrongful act done intentionally by the defendant, without justification or excuse, so as to fix the defendant with malice in law within the rule as laid down in *Bromage v. Prosser*, 4 B. & C. 247, 255, supposing it to be applicable to actions for malicious prosecution, or that the defendant in doing what he did was in any manner actuated by improper motives:

In my opinion the action on the evidence wholly fails.
The rule must be made absolute to enter a nonsuit.

MORRISON, J., and WILSON, J., concurred.

Rule absolute.

IN THE MATTER OF THE BOARD OF EDUCATION OF THE
TOWN OF PERTH AND THE CORPORATION OF THE
TOWN OF PERTH.

*Board of Education—Constitution and powers—37 Vic. chs. 27, 28, O.—
Mandamus to raise money for high school purposes—Demand.*

Upon the affidavits and facts stated below, a mandamus *nisi* was ordered, on the application of the Joint Board of Education of the Town of Perth, commanding the corporation of the Town to provide \$16,000, as required by said Board, for the maintenance and accommodation of the High School, to pay for a school site and building of a school house and premises connected therewith, as shewn by the estimates prepared and submitted by said board to the corporation.

It was *held* that the Joint Board of Education were the proper applicants, and not the Trustees of the High School Board.

The sections of the High School and Public School Acts, 37 Vic. chs. 27, 28, O., which confer on the joint board the powers of each board, mean the powers possessed by each board for the purpose for which such board was created, before the creation of the joint board.

Semble, that the demand here was not in form sufficient; but the council having resisted the application on other grounds effect was not given to the objection.

Hoyles, in the vacation after Hilary term last, April 28, 1876, obtained a rule, returnable before the full Court on the first day of Easter term last, calling on the corporation of the Town of Perth to shew cause why a writ of mandamus should not issue out of this Court commanding the corporation of the town of Perth to provide the sum of \$16,000 for the Board of Education of the town of Perth, as required and demanded by the said board, to pay for a school site and building of a school house and premises connected therewith, and for school accommodation, as shewn upon and according to the estimates prepared by the said board and furnished by them to the council of the corporation of the town of Perth; or why the said corporation should not be commanded by the said writ to provide the sum shewn by the said estimates to be necessary for erecting said buildings and for maintenance and school accommodation, as shewn upon affidavits and papers filed; and why such other order should not be made herein as to costs as to the Court may seem fit; and on grounds disclosed in affidavits and papers filed.

The affidavits and papers filed disclosed the following, among other facts :—

The Board of Education of the town of Perth was established in 1851, by the union of the then existing grammar school or high school and the common or public school trustees.

The existing accommodation in the town of Perth for the schools under the control of the Board of Education consists of lot 6 on the south side of Foster street, containing one quarter of an acre, on which is erected a two-story stone building, containing eight rooms, six of which are used for the public school and two for the high school.

The board also hold what is known as the old grammar school lot, being a part of lot 6 on the north side of Craig street, and containing about one quarter of an acre of land, upon which no building is erected.

The number of pupils on the register of the public school is 437, and the number of pupils on the register of the high school is 91:

The last school census shews the number of children in the town between the ages of five and sixteen to be 611, not including children attending or supposed to attend the Roman Catholic separate school in the town.

The population of the town is about 2,800, and the amount of the whole ratable property of the town, according to the last revised assessment roll, is \$102,750.

The Board of Education and the School Inspector are of opinion that the existing school accommodation is altogether insufficient and unsuitable for the requirements of the town.

The board last year decided that it was necessary to obtain increased accommodation, both with regard to a school site and school building, and with that object treated with several parties as to the purchase of a site, obtained plans and specifications for a school building, and advertised for tenders for the erection of such a building.

The board during the present year purchased a school site at the price of \$2,500, and entered into a contract for the

erection of a suitable school building thereon for the sum of \$11,845.

The quantity of land purchased for the school site is five acres; the price agreed \$2,500, to be paid at any time up to 1st of August, 1876, with interest at seven per cent. from 1st of November, 1875. The agreement for the sale, which was in writing, dated 1st of February, 1876, gave liberty to the board to enter upon the land and deposit thereon materials required for the erection of the new high school.

The agreement for the erection of the school house was dated 12th January, 1876. It bound the contractors to have the building erected on or before the 15th of November, 1876. The price was \$11,845, by instalments of \$85 for every \$100 worth of work done and materials provided, the first instalment to be paid on the 15th of April, 1876, and the remaining instalments to become due and payable every two weeks until the building should be fully completed. The balance of the price was payable on the completion of the work.

On the 21st January, 1876, the secretary of the Joint Board of Education, under the instructions of the board, addressed a letter to the corporation of the town, requesting that corporation "to raise and pay over to the said Board of Education the sum of \$16,000 for the purchase of a site for and the erection, completion and furnishing of a new high school building for the said town of Perth, pursuant to the statute in that behalf."

On the 21st February last the following resolution was introduced by a member of the council and negatived on a tie vote: That in the opinion of this council the amount asked for by the Board of Education, namely, \$16,000, is a very extraordinary one, it being more than the whole amount of taxes levied in the town for all purposes for two years. That whereas we have in the town two school sites (besides that of the separate school), one of which is an acre in extent, and has on it a two-story stone school house in which the high and public schools are at present held,

but which, owing to the number of scholars attending the said schools having gradually increased, does not afford quite adequate accommodation; this council is willing to take all proper steps for raising within a reasonable time such sum as may be necessary for enlarging the said school, so as to afford the accommodation required by law; but this council cannot comply with the request of the Board of Education for so very large a sum as \$16,000, and consider any scheme involving the expenditure of anything like that sum as unwise in the extreme.

On the 20th of February, 1876, the secretary of the Joint Board of Education, acting under the instructions of the board, wrote to the council of the town, giving a detailed estimate of the sums required. The estimate was made up as follows:—

Price of land.....	\$ 2,500
Contract for building.....	11,845
Plans and cost of Inspector.....	500
Furnaces	400
Out-buildings	100
Slating	300
Fencing	500

Total.....\$16,145

Say, \$16,000

The letter concluded by stating, under the instructions of the board, that if the municipal corporation had not the money on hand out of which to pay the sum required, the board would be willing to accept debentures of the town, properly issued and payable at a period not exceeding twenty years, or notes of the town payable on the collection of the taxes of the town for the present year.

On the 6th March, 1876, the introduction of a by-law for the purpose of raising the amount failed to carry in the council, there being five for the motion and five against it.

On the 20th March, 1876, a motion to introduce a by-law to raise the money met the same fate as the former motion, and on the same division—five to five.

The council, at the same meeting and on the same

division, negatived a motion for the appointment of a committee to consult with the Board of Education as to whether they would not be willing to erect the building on a particular site named, and reduce the estimate to \$15,000.

On the 10th April, 1876, the Board of Education again requested the council of the town to provide the \$16,000, being the amount first required.

A resolution of the council, again introduced in reference thereto, was again negatived on the same division as before, the council again refusing to take any steps towards providing the sum required.

The Inspector of Schools reported the school accommodation in Perth quite inadequate, except for public school purposes, and in consequence the chief superintendent of education, on the 27th November, 1875, wrote, insisting upon further accommodation being provided for high school purposes,

The legislative grant for the last year (1875) was withheld until the board informed the department of public instruction that they had purchased the site, and given out the contract for the erection of the school building.

Still the council of the town refused to provide the amount required, or to pass any by-law as to the same.

On the 24th March, 1876, the Board of Education instructed counsel to take the necessary legal proceedings to compel, if possible, the town to provide the amount required.

During this term, May 29, 1876, *Armour*, Q. C., (*J. K. Kerr*, Q. C., with him) shewed cause. The Board of Education are not the proper applicants, and the application should have been made at the instance of the trustees of the high school board: 16 Vic. ch. 186, sec. 11, sub-sec. 4; 16 Vic. ch. 185, sec. 8; Consol. Stat. U. C. ch. 63, sec. 25, sub-sec. 7; *Ib.* ch. 64, sec. 79, sub-sec. 9; 23 Vic. ch. 49, sec. 10; 29 Vic. ch. 23, sec. 5; 37 Vic. ch. 27, sec. 63 O.; 37 Vic. ch. 28, sec. 26, sub-sec. 10, O.; *Ib.* sec. 87,

sub-sec. 6; *Ib.* sec. 151, sub-sec. 9; *Board of Trenton and Corporation of Trenton*, 26 U. C. R. 353; *Joint Board of Caledonia v. Farrell*, 27 U. C. R. 321; *Oliver v. The Union Board of Ingersoll*, 29 U. C. R. 409. And even if the applicants are the right applicants, there is no such duty cast on the town as contended: 37 Vic. ch. 27, secs. 44, 45; 34 Vic. ch. 33, secs. 33, 40; 37 Vic. ch. 27, sec. 47, sub-secs. 1, 2, 3; *Ib.* sec. 61, sub-sec. 5; Consol. Stat. U. C. ch. 63, sec. 25, sub-sec. 5; *Re Trustees of Weston Grammar School v. The Corporation of the United Counties of York and Peel*, 13 C. P. 423; 12 Vic. ch. 81, sec. 41, sub-sec. 3; 36 Vic. ch. 48, sec. 383, sub-sec. 5, 6; and no legal change of site was shewn: 37 Vic. ch. 27, sec. 36. The demand is extravagant, and the Court, on the merits, should refuse the writ: *Regina v. Garland*, L. R. 5 Q. B. 269; *School Trustees of Port Hope v. Town Council of Port Hope*, 4 C. P. 418.

The affidavits filed in shewing cause disclose the following grounds of contention: It is wholly unnecessary to build a high school of the size and at the cost proposed; not more than \$5,000 is necessary for such a purpose, if any change be really necessary. The average attendance at the high school, previous to the time when the present High School Act went into force, was about 53. In February last the average attendance was 80, in March, 79, in April, 78. The increase of pupils during the last two years has not arisen from any increase of population, but from the circumstances that under the present school Acts, the standard for the qualification of teachers being raised, many of those intending to be teachers have, during the last two years, attended the high schools at Perth and elsewhere, in order to have one or two years tuition to qualify them for passing their examination; and this increase is nearly altogether from outside the limits of the high school district. There is no reason to believe there will be an increase in the future. A reason for believing that there will be a decrease rather than an increase, is the opening of the new normal school at Ottawa. The population of Perth is also

decreasing of late years. The average attendance at the high school and the public schools is only 456. It is not true that in Perth, between the ages of five and sixteen, excluding separatists, the number of children is 611. The board possesses in the present school house a large stone structure (of which a photograph was laid before the Court,) with an acre of land attached thereto.

A new arrangement of the rooms is all that is necessary to give whatever additional accommodation is required. The situation of the new site was condemned as being neither pleasant nor convenient, and as being near what is known as the "long swamp." The proposed expenditure was characterized as a waste of public money. Facts were stated to shew that those who favoured it in the council and at the school board were not influenced by the most lofty motives. It was shewn that two out of five of the members of the council were members of the high school board; that a third member of the council in favour of the expenditure had been appointed inspector or clerk of the works at a salary of \$200 per annum, and the remaining two were shewn to be related to the three preceding. It was also stated that the motives of those on the high school board favourable to the expenditure; were not solely with a view to the public interest. It was insinuated that the necessities of a person in Perth having a large quantity of unsaleable bricks, and of another person having a large quantity of unsaleable lumber, had more to do with the proposition to build a new high school than the necessities of the public. Some affidavits were filed on the part of the applicants, shewing that the present school house was not healthy; but affidavits to the contrary were filed on the part of the town.

Bethune, Q. C., (Osler with him,) supported the rule. The 37 Vic. ch. 27, is to be read as a new law; and so reading it the joint board is a corporation and not a mere committee of management: sec. 63, subsec. (c): and while it exists the functions of the separate boards are suspended: *Id.* The applicants there-

fore are the only corporation capable of applying, and it is the duty of the town council to comply with the request: 37 Vic. ch. 28, sec. 86, sub-sec. 5 *a.*; sub-sec. 11, *b. c. e.*; sub-secs. 20, 21; sec. 87, sec. 69, 70, sub-sec. 9; sec. 114; *Re School Trustees of the City of Toronto and Corporation of the City of Toronto*, 23 U. C. R. 203; *Re Trustees of Sandwich and Corporation of Sandwich*, *Ib.* 639. Before the Act the duty was obligatory in regard to public schools, and the joint board has now all the powers of both the separate boards. By the word accommodation is meant support and maintenance: 37 Vic. ch. 27, secs. 44, 45, 46, 47. The discretion as to the expenditure is vested in the joint board, and not in the town council: 37 Vic. ch. 28, sub-sec. 2 of sec. 48. The board is responsible to the ratepayers for their conduct, and the town council have no discretion whatever in the matter.

June 29, 1876, HARRISON, C. J.—This rule must be disposed of upon the interpretation to be placed upon different sections of 37 Vic. chs. 27 and 28, O.

Nothing, it has been said by a great authority, is so difficult as to construe properly an Act of Parliament, and nothing so easy as to pull it to pieces: per Lord St. Leonards, in *O'Flaherty v. McDowell*, 6 H. L. 142, 179.

If his Lordship had ever been called upon to interpret one of our school Acts he would not have found any occasion to alter the opinion which he above so tersely expressed.

If there were more skill in the first instance employed in the framing of public Acts of Parliament there would be much less need of frequent amendments, much less perplexity, and much less litigation than at present exists in this Province.

The statute 37 Vic. ch. 27 is intituled "An Act to amend and consolidate the law relating to the council of public instruction, the normal schools, collegiate institutes, and high schools."

The statute 37 Vic. ch. 28 is intituled "An Act to amend and consolidate the public school law."

Both of these Acts profess not only to be consolidations of preceding Acts but to be amending Acts, and so far as inconsistent with preceding Acts are to be deemed new laws.

The intention of the Legislature can be collected from no other evidence than its own declaration, that is, from the Act itself: per Tindal, C. J., in *Salkeld v. Johnson*, 2 C. B 757.

The first question is, as to the constitution of the joint board of education and its powers when constituted.

It is by sec. 63 of 37 Vic. ch. 27 declared that:—

“In all cases of the union of high school or collegiate institute and public school trustee corporations now existing, all the members of both corporations shall constitute a joint board, and shall, as long as the union exists, be a corporation under the name of the board of education for the city, town, or incorporated village of———, or in school section No. —, in the township of———, as the case may be;

(a.) Seven members of the board shall form a quorum, *and such board shall have the powers of the trustees of both the public and high schools* * *;

(b.) The union may be dissolved at the end of any year by resolution of a majority present at any lawful meeting of the said board of education called for that purpose;

(c.) On the dissolution of such union the school, property *held* or *possessed* by the board of education at the time shall be divided or applied to school purposes, as may be agreed upon by a majority of the public school trustees and of the high school or collegiate institute, trustees respectively, present at meetings called for that purpose; * *

(d.) After the first day of July, 1874, no public school or department thereof shall be united with a high school or collegiate institute.”

A similar provision will be found in sec. 151 of the public school Act 37 Vic. ch. 28.

These provisions are inconsistent with the idea that the joint board is a mere committee of management representing the two boards, such as was the joint board under former Acts of Parliament and the decisions there-

under. See 16 Vic. ch. 186 sec. 11 sub-sec. 4; Consol. Stat. U. C. ch. 63 sec. 25 sub-sec. 7; *Ib.* ch. 64 sec. 79 sub-sec. 9. See also *The Board of Trenton and The Corporation of Trenton*, 26 U. C. R. 353; *The United Joint Board of Caledonia v. Farrell*, 27 U. C. R. 321; *Oliver v. The Union Board of Ingersoll*, 29 U. C. R. 409.

While the union exists there is but one board composed of the members of the two separate boards. That board is a corporation, and possessed of all the powers of each of the separate boards.

The application, therefore, for the mandamus is rightly made in the name of the joint board, and not in the name of the trustees of the high school.

It is now necessary to examine the powers of the separate boards, which powers are, as it were, under the operation of the Act, transferred to the joint board.

First, as to the high school board.

The trustees of every high school or collegiate institute is a corporation by the name of "The High School" (or collegiate institute) "Board," prefixing to the high or collegiate institute the name of the city, town, or incorporated village within which such high school or collegiate institute is situated, and shall have and possess all the powers usually employed by corporations, so far as the same are necessary for carrying out the purposes of this Act: 37 Vic. ch. 27, sec. 60.

All property heretofore given or acquired in any municipality, and vested in any person or persons, or corporation for high school or collegiate institute purposes, or which may hereafter be so given or acquired, vests absolutely in the corporation of high school or collegiate institute trustees having the care of the same, subject to such trusts as may be declared in the deed or instrument under which the property is held: *Ib.* sec. 87.

It is the duty of the trustees of every high school or collegiate institute board to take charge of the high school or collegiate institute for which they have been appointed trustees, and the buildings and lands appertaining to it:

sec. 61, sub-sec. 4. And to do whatsoever *they may deem expedient* with regard to erecting, repairing, warming, furnishing, and keeping in order the buildings of such school or institute, and its appendages, lands, and enclosures belonging thereto: sub-sec. 5. And to apply (as the case may be) to the municipal council of the city, or of the town *separated from the county* for municipal purposes, for such sum or sums *which said board may require* for the support, management, and school accommodation, and other necessary expenses of the high school or collegiate institute, and which said council is *required* by this Act to raise by local assessment for such purposes: sub-sec. 6.

The school board, and not the municipal council, is to judge of the expediency of the expenditure intended by the preceding sub-section.

The words "support, management, and school accommodation," as used in that sub-section, manifestly embrace "erecting, repairing, warming, furnishing, and keeping in order the buildings" mentioned in the fifth sub-section.

An obligation to provide proper school accommodation necessarily involves maintenance and repair. See per Hagarty, C. J., in *Regina v. Law Society*, 20 C. P. 490, 494, and per Gwynne, J., *Ib.* 512.

In the case of a high school in a town *not withdrawn from the county*, or in an incorporated village or township, one half of the amount paid by the Government is to be paid by the municipal council of the county in which the high school or collegiate institute is situated, upon the application of the high school board, and "such *other* sums as may be required for the *maintenance and school accommodation* of the said high school" shall be raised by the council of the municipality in which the high school is situated, upon the application of the high school board, or in the event of the county council forming the whole or part of a county into one or more high school districts, then "such *other* sums as may be required for the *maintenance* (*quære*, and accommodation) of the said high school shall be provided by the high school district, upon the application

of the high school board: sec. 45. See *In re Niagara High School Board and Corporation of Niagara*, 37 U.C.R. 529.

The manifest object of the section is to provide for "the maintenance and school accommodation of the high school." That object is to be attained by a fund, of which part shall be by the government, part by the municipal council of the county in which the high school is situate, and

1. If the county council have not formed the county or part of the county into one or more high school districts, the remaining money required for maintenance and school accommodation "*shall* be raised by the council of the municipality in which the high school is situate," &c., upon the application of the high school board.

2. Or if the county council have formed the whole or part of the county into one or more high school districts then the remaining money required for the maintenance, (*quære*, and school accommodation)—*shall* be provided by the high school district, upon the application of the high school board. See *Re Tyrrell and Corporation of York*, 35 U. C. R. 247.

It is not shewn that the county council formed the county or part of the county into one or more high school districts, and I assume the contrary for the purpose of the present decision.

The word "shall," as used in the last quoted section, is obligatory: *Regina v. Court of Revision of the Town of Cornwall*, 25 U. C. R. 286; and in this respect a change has been made in the law for the support of grammar and high schools since 1863, when *Re Trustees Weston Grammar School and Corporation of United Counties of York and Peel*, 13 C. P. 423, was decided.

The change was first made by 34 Vic. ch. 33, sec. 36, under which *Re Trustees Port Rowan High School and Corporation of Walsingham*, 23 C. P. 11, was decided.

The council of any municipality, or the councils of the respective municipalities, out of which *the whole* or *part* of a high school district is formed, *shall*, upon the application

of the high school board, raise the *proportion* required to be paid by such municipality or part of a municipality from the whole or part of the municipality, as the case may be.

The foregoing enactments, from sec. 44 to 46, inclusive, are in the Act, under the heading of "Obligatory municipal assessment for high schools." Then follows, under the heading "Voluntary municipal assessments": sec. 47. It is as follows:—

The council of every county, city, and town, separated from the county for municipal purposes, *may* pass by-laws for the following purposes:—

1. For making provision by local assessment (in addition to that *required* to be made by this Act) for procuring sites for high schools, for erecting buildings, repairing, furnishing, warming, and keeping in order high school houses and their appendages.

2. For obtaining within the county, or in any city or town separated from the county, as the wants of the people may require, the real property requisite for erecting high school houses thereon, and for other high school purposes, and for preserving, improving, and repairing such high school houses, and for disposing of such property when no longer required.

5. For making provision (additional to that *required* to be made by this Act) in aid of such high schools *as may be deemed expedient by the Council, &c.*

The town of Perth is not, I believe, a town separated from the county for municipal purposes, within the meaning of this section, and therefore the section is inapplicable.

But I do not read the section as containing the *only* provision in the Act for procuring sites or for building school houses, any more than for repairing, furnishing, warming, and keeping in order high school houses.

A certain amount of money, being the residuum, may, I think, under the operation of the preceding sections, be *required* by the board for all or any of these purposes, and it is for the council to which the section applies, if they

deem it expedient, to make further provision beyond what is required.

The providing of school accommodation involves the procurement of a site and the building of a school house, and where the latter is from any cause insufficient for the purpose, also involves the acquirement of a new site or the building of a new school house, in the discretion of the school board.

The distinction between what is obligatory and what permissive, is further carried out in sub-sec. *a.* of sub-sec. 6 of sec. 61, and sub-sec. 7 of the same section.

Section 36 of the Act 37 Vic. ch. 27, which declares that the *place of holding* any high school in a county may be changed at the end of the then civil year by the council of the county within which it is established by by-law or resolution passed for that purpose, at or before the June session, and approved of by the Lieutenant-Governor on the report and recommendation of the chief superintendent, applies, I think, rather to the change from one place to another in the county than from one site to another in the same town or village, and this view is strengthened by a reference to sec. 37, which in like manner provides for the discontinuance of an existing high school in any part of the county within the jurisdiction of the county council.

So much for the powers of the high school board.

Second, as to the public school board.

The school trustees for each city, town, incorporated village, or division, shall be a corporation under the name of "the public school board of the city (town, village, or division,) of ———, in the county of ———, and shall succeed to all the corporate property, rights and powers, and be subject to all the corporate obligations and liabilities of the preceding trustees": 37 Vic. ch. 28, sec. 85.

It is the duty of the public school board to take possession of all public school property: sec. 86, sub-sec. 4: and by sub-sec. 5 to do whatever *they may judge expedient* with regard:

(*a.*) To purchasing or renting school sites and premises.

(*b.*) To building, repairing, furnishing, warming, and

keeping in order the school houses and appendages, lands, enclosures, and moveable property; and, by sub-sec. 7,

To determine

(a) The number of sites, and grades, and description of schools, &c.: and by sub-sec. 11: to prepare from time to time, and lay before the municipal council of the city, town, or village an estimate of the houses which they think requisite.

(c). For building, renting, repairing, warming, furnishing, and keeping in order the public and industrial school houses and their appendages and grounds.

Every public school board also has authority to select land for a school site on which to erect a school house or school houses and necessary buildings, or for enlarging school premises already held: sec. 87 sub-sec 9.

The right to decide as to the expediency of increased school accommodation under either Act, whether for high schools or public schools, appears to rest with the several boards, or where united with the joint board, and not with the municipal council within which in whole or in part the high school or public school is situate.

High school trustees are appointed by the municipal bodies: 37 Vic. ch. 27 sec. 50 *et seq.*; and public school trustees by the ratepayers: 37 Vic. ch. 28 sec. 19 *et seq.* For abuse of these powers or the exercise of unsound discretion they are responsible to their constituents in the same manner as members of municipal councils to their constituents.

Therefore, where the board of education has the right to *require* money for school purposes from any municipal body, the municipal body has no right to refuse.

It is, under sec. 86 sub-sec. 11 of the 37 Vic. ch. 28, made the duty of the trustees of public schools to prepare from time to time and lay before the city, town, or village council an estimate of the sums which they, the trustees, think requisite.

(a) For paying the whole or part of the salaries of the inspectors.

(b) For purchasing or renting public and industrial school premises.

(c) For building, renting, and repairing it, &c.

(d) For procuring suitable apparatus.

(e) For the establishment and maintenance of school libraries.

(f) And for all *other* necessary expenses of the schools under their charge.

And it is expressly provided that "the council of the city, town, or village, *shall* provide such sums *in the manner* desired by the public school board."

This authorizes the trustees to direct at what time the money shall be paid, but not how it is to be procured: See *Re Board of Trustees of Toronto and the Corporation of the City of Toronto*, 23 U. C. R. 203; *Re Board of School Trustees of Sandwich and the Corporation of Sandwich*, *Ib.* 639.

It has been held that in the case of a demand by the trustees of a public school it is necessary to give the estimates on which the sums required were based, to the municipal council: *Trustees of Port Hope v. Town Council of the Town of Port Hope*, 4 C. P. 418; *Re Board of Trustees of Toronto and City of Toronto*, 20 U. C. R. 302; S. C. 23 U. C. R. 203; *Re Trustees of Mount Forest and Corporation of Mount Forest*, 29 U. C. R. 422; *In Re Public School Trustees of South Fredericksburg and Lennox and Addington*, 37 U. C. Q. B. 534. But not so in the case of a demand by the trustees a grammar school: *Re Trustees of Port Rowan High School and the Corporation of the Township of Walsingham*, 23 C. P. 11.

In the case of a demand by a joint board, especially if the demand be for public school purposes, the estimates should certainly be given to the council.

Here, although for high school purposes, whether an estimate be necessary or not, an estimate was given.

It is under sec. 46, sub-sec. 5, as extended by sec. 67 of 37 Vic. ch. 28, the duty of the city, township, town, or incorporated village (as the case may be), to levy, by assessment, upon the taxable property in any school section, such sum as may be required by the trustees thereof for the purchase of the school site, the erection, repairs, furni-

ture and fittings of a school house, &c., as may be determined by the trustees.

So under section 48, sub-sec. 52 and sec. 67, every city, town, township, and village council, has authority to pass by-laws for the following purposes :—

“To grant to the trustees of any school section, on their application, authority to borrow any sums of money which they may think necessary for the purchase of school sites, for the erection or repair of a school-house or school-houses or their appendages, or for the purchase or erection of a teacher's residence.”

So under section 46, sub-secs. 6 and 7 and sec. 67, every town, township, and village council, has authority to pass by-laws for the following purposes :—

To issue a debenture or debentures in the form given in schedule A to the Act for the amount made to the school trustees of any section, (should the council, under the authority of sub-sec. 2 of sec. 48, grant to the trustees authority to borrow money) any loan which the council may authorize the trustees of such school section to make together with a sufficient sum for the payment of the interest of the sum so borrowed, and a proportionate sum sufficient to form a sinking fund to pay off the principal at any time within ten years.

To cause to be levied in each year upon the taxable property in the school concerned (and upon such other taxable property as is herein made liable in case of an alteration in the boundaries of the section or division), a sum sufficient to pay the interest on the amount borrowed by the trustees on the authority of the council, and also a sum sufficient to pay off the principal during any period not exceeding ten years, as may be agreed upon by the trustees and the lender of the money.

There does not appear to be any obligation on the municipality to grant the authority to borrow. It appears to be in the discretion of the council to refuse the authority; and, when granted, it can only be on the terms and in the manner pointed out in the statute: See *Re Doherty and Corporation of the Township of Toronto*, 25 U. C. R. 409.

I am not aware of any such power in the case of high school trustees requiring money for high school purposes.

The powers conferred on high school trustees are not identical with the powers conferred on public school trustees. Much confusion has arisen in this case, and will arise in every similar case, from the attempt to unite diverse powers for different purposes in one and the same governing body.

The sections of the High School and Public School Acts which confer on the joint board the powers of each board, must mean the powers possessed by each board for the purpose for which such board was created before the creation of the joint board: 37 Vic. ch. 27, sub-sec. *a.*; 38 Vic. ch. 28, sec. 151.

Any other reading would lead to great confusion.

Supporters of Roman Catholic separate schools are under certain circumstances exempt from taxation for public schools, but not from taxation for high schools. Where the money is required, as here, for high school purposes, there would not therefore appear to be exemption from taxation.

If the demand here were for public school purposes, there would be no doubt as to the duty of the town to comply, and as to the exemption of the separatists from the rate: 37 Vic. ch. 28, sec. 46, sub-sec. 5, and sec. 67.

But where the demand is for high school purposes it must, by whomsoever demanded, *i.e.*, whether by joint or separate boards, be shewn to be such a demand as is obligatory upon the municipal corporation in the case of a high school.

The demand here, if obligatory at all, can *only* be so held as coming under the operation of sec. 45, and not under sec. 47, of the High School Act.

The board has no power, under section 45, to demand the money otherwise than as money required "for the maintenance and school accommodation" of the high school. The board has no power in any year to demand the whole of the money required for these purposes from the municipal council, but only the residue, after deducting the amount paid by Government and the amount paid by the council of the county.

It is under section 46 made the duty of the council of any municipality, or the councils of the respective municipalities, out of which the whole or part of which the high school district is formed, upon the application of the high school board, to raise *the proportion* required to be paid by such municipality or part of the municipality from the whole or part of the municipality, as the case may be.

The mode, division, or proportion was clearly shewn in the affidavit for the writ of mandamus in *Re Trustees of Port Rowan High School, and the Corporation of the Township of Walsingham*, 23 C. P. 11.

It was there shewn that the whole amount needed for the maintenance and school accommodation of the high school for the year 1871 was \$658 43

Of which was received from Government...\$400 00

From the County Council..... 200 00

————— 600 00

Leaving \$58 43
required from the municipality.

So, for the year 1872 the amount needed was \$484 83

Of which was received from Government...\$171 00

From the County Council..... 85 50

————— 256 50

Leaving \$228 33
required from the municipality.

The demand here is, not in form for the balance necessary after crediting the amounts received from the Government and from the county council, but from what we know of the amount of the Government's grant, and the amount of the county council grant, in all probability the balance necessary to be provided by the municipal council is not much, if anything, short of \$16,000.

If the council had resisted the application on the ground that the demand was not in form sufficient, we might have felt bound to have given effect to the contention, and discharged the rule: *Re School Trustees of Port Hope v. Town Council of the Town of Port Hope*, 4 C. P. 418, but as the resistance is on a wholly different ground, we should not

now, according to the authorities, give effect to the objection. See *Board of School Trustees of the Town of Brockville v. The Town Council of Brockville*, 9 U. C. R. 302; *The School Trustees of the City of Toronto v. The Corporation of the City of Toronto*, 20 U. C. R. 302.

The rule must be absolute for the issue of a mandamus in the words of the statute, for the raising by the council of the Town of Perth, in which municipality the high school is situate, of such sum, naming it, as during the present year is required for the maintenance and accommodation of the high school, after deducting the amounts paid or payable by the Government and county council respectively.

The statute does not direct in what manner the money is to be raised.

It is not for the trustees or for the Court to dictate to the council in what manner the money shall be raised: *School Trustees of Toronto v. The Corporation of the City of Toronto*, 20 U. C. R. 302, 305.

The joint board do not press for payment of the whole amount in one year, provided the amount be in some manner legally secured, so that the securities shall be made available for the purpose of discharging the obligations contracted by the joint board.

Instead of making the rule absolute for a mandamus, we think it better, under the circumstances, as in *Re Board of School Trustees of Toronto v. Toronto*, 23 U. C. R. 203, to make it absolute for a mandamus *nisi*: in the hope that the parties will come to an understanding which will meet the demand of the joint board without being oppressive to the ratepayers; and if not, that the legal questions involved may be formally raised by demurrer or plea—See *Regina v. Vestry of St. Luke's, Chelsea*, 5 L. T. N. S. 744; and in the event of the joint board being ultimately successful, a peremptory writ shall be issued, which the council must obey under pain of attachment.

The rule will be made absolute. Costs to abide the event.

MORRISON, J., and WILSON, J., concurred.

Rule accordingly.

COLE V. BANK OF MONTREAL.

Assignment of judgment and covenant—35 Vic. ch. 12, O.—A. J. Act 1873, sec. 2—Champerty and maintenance.

One D. had recovered three judgments against different persons, one in the County Court and two in the Queen's Bench. The defendants, being assignees of these judgments, received payment of and discharged the County Court judgment, and afterwards by deed assigned to one F. the said several judgments, covenanting that they had received no payment thereon, and had not released any part thereof. F. assigned to M. "the said several judgments," and said assignment to him, "and all benefit to be derived therefrom, either at law or in equity." And M., by deed, endorsed on the assignment to himself, assigned to the plaintiff "all his right, title, interest, and claim to and in the said several judgments referred to in the within assignment thereof."

Held, MORRISON, J., doubting, that the plaintiff could, in his own name, sue the defendants on their covenant, either as assignee of the covenant under the 35 Vic. ch. 12, O., or as having an equitable right to enforce the covenant against defendants for a "purely money demand," under sec. 2 of the Administration of Justice Act of 1873; and that it could not be said that there being no judgment to assign the covenant could not be assigned as incident to it, for defendants by their deed and covenant were estopped from asserting that the judgment had then been paid.

Held, also, that there was clearly no champerty or maintenance in the assignment from F. to M., or from M. to the plaintiff.

DEMURRER. (a) Declaration: For that one John W. Downs, before the entering into by the defendants of the covenant hereinafter mentioned, and on the 10th December, 1857, recovered a judgment in the County Court of the county of Brant, against Arthur Smith, John McNaught, and Charles Merigold, for the sum of £50 13s. 5d. damages, and £9 14s. 6d. costs taxed, and did also on the 24th of February, 1858, recover a judgment in Her Majesty's Court of Queen's Bench for Upper Canada, against James H. Rich and Franklin P. Goold, executors of George Babcock, deceased, for the sum of £289 6s. 4d. damages, and £81 7s. 7d. taxed costs; and did also on the 8th of March, 1858, recover a judgment in Her Majesty's Court of Queen's Bench for Upper Canada against Arthur Smith, John McNaught, and John A. Wilkes, for the sum of £113 6s. damages and £11 3s. 4d. taxed costs; and that the said John W. Downs, by deed poll under his hand and seal, bearing date the 29th of January, 1858, did transfer, bargain, sell, assign, and set over for a valuable consider-

(a) This case was first argued before WILSON, J., sitting alone.

ation therein expressed, to one George Westlake, his heirs, executors, and administrators, all the right, title, claim, property, and demand and interest of the said John W. Downs, in and to the said claims and demands hereinbefore mentioned, for which the said several judgments were recovered as aforesaid ; and the said George Westlake became, under and by virtue of the said deed poll, entitled to the said several judgments ; and further, that the said George Westlake, by deed poll under his hand and seal, bearing date the 14th of October, 1859, did assign and set over the several judgments hereinbefore mentioned, for a valuable consideration therein expressed, to one Archibald Greer, in his capacity as manager of the branch office of the defendants, at the town of Brantford, in the county of Brant, and the defendants, by virtue of the said deed poll, became the owners of and entitled to the said several judgments ; and further, that the defendants, being the owners of and entitled to the said several judgments as aforesaid, by deed under their common seal, bearing date the 13th of February, 1866, did, in consideration of the sum of \$150 to them paid by John Fisher, of the town of Batavia, in the State of New York, one of the United States of America, at or before the sealing and delivery of the said deed, the receipt whereof was thereby acknowledged, bargain, sell, assign, transfer, and set over unto the said John Fisher, his heirs, executors, administrators, and assigns, forever, all the right, title, claim, property, demand, and interest whatsoever of the defendants in the said several judgments hereinbefore particularly mentioned, together with the said assignment, and every matter and thing therein contained, to hold, receive, and take the same and all benefit and advantage thereof, and every part thereof, to and for the proper use of the said John Fisher, his heirs, executors, administrators, and assigns, and as and for his and their own proper moneys and effects, absolutely ; and the defendants did in and by the said deed covenant with the said John Fisher that they had not received payment either in part or in the whole upon any of the said men-

tioned claims, and that they had not made any release or discharge of the same, or any part thereof, nor done any matter or thing since the same or any part thereof came into their hands, whereby the same or any part thereof had become impaired or in any wise affected, as a good, valid, and subsisting security for the whole sums so expressed to have been assigned to the defendants in and by the said assignment from the said George Westlake to the defendants, and that they would and should not thereafter release, discharge, or extinguish the same without the consent of the said John Fisher, his executors or administrators thereunto, first had and obtained. And that the said John Fisher did, by indenture bearing date the 22nd January, 1869, made between the said John Fisher, of the first part, and one Thomas B. McMahon, of the second part, for a valuable consideration, grant, bargain, sell, assign, transfer, and set over to the said Thomas B. McMahon the said several judgments and the said assignment to the said John Fisher, and all benefit to be derived therefrom either in law or in equity, or otherwise howsoever; and the said Thomas B. McMahon, by deed poll under his hand and seal, bearing date the 4th of March, 1872, did assign, transfer, and set over to the plaintiff the matters aforesaid, and the plaintiff is now the holder of and entitled to the said deed so executed by the defendants as aforesaid, bearing date the 13th of February, 1866, and to all the benefit and advantage thereof, and of all the covenants, clauses, and stipulations therein contained; and all conditions have been fulfilled, and all things have happened, &c., necessary to entitle the plaintiff to the benefit of the covenant of the defendants hereinbefore mentioned, yet the defendants, contrary to their said covenant in that behalf, did receive payment in part of the claims or judgments mentioned in the said deed, bearing date the 13th of February, 1866, to meet payment of the judgment in the said deed mentioned in the County Court of the County of Brant, of John W. Downs, plaintiff, against Arthur Smith, John McNaught, and Charles Meri-

gold, defendants, and did release and discharge part of the said claims, to wit, the said judgment in the said County Court against Arthur Smith, John McNaught, and Charles Merigold; and did since the said judgments came into their hands, do something whereby a part thereof became impaired and affected as a good, valid, and subsisting security for the sums expressed to have been assigned to the defendants in the said deed from the said George Westlake, by, to wit, receiving the payment of the said judgment in the said County Court against the said Arthur Smith, John McNaught, and Charles Merigold, and did release, discharge, and extinguish part of the said judgments, to wit: the said judgment in the said County Court against the said Arthur Smith, John McNaught, and Charles Merigold, without the consent in writing of the said John Fisher, his executors or administrators, thereunto first had and obtained, whereby the plaintiff has been deprived of the benefit of the said deed of the 13th February, 1866, and the said transfer thereof, and has lost and been deprived of the said judgment in the said County Court against the said Arthur Smith, John McNaught, and Charles Merigold, and the benefit and advantage thereof, and the moneys arising therefrom.

The common counts were added: for money lent by the plaintiff to the defendants, and for money paid by the plaintiff for the defendants at their request, and for money received by the defendants for the use of the plaintiffs, and for interest upon money due from the defendants to the plaintiffs, and forborne at interest by the plaintiff to the defendants at their request, and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Fifth plea, to the first count: that payment of the judgment in the County Court of the county of Brant, of John W. Downs, plaintiff, against Arthur Smith, John McNaught, and Charles Merigold, defendants, was received before the 13th of February, 1866, and that the deed poll under the hand and seal of the said Thomas B.

McMahon, bearing date the 4th of March, 1872, in the said first count mentioned, was written and endorsed on the said deed of assignment from the said Fisher to the said McMahon in the said Court also mentioned, and was, and is, in the words and figures following, that is to say:—

“For valuable consideration to me in hand paid by Southworth Cole, of Brantford, fanning-mill maker, I hereby assign, transfer, and set over unto the said Southworth Cole, his executors, administrators, and assigns, all my right, title, interest, and claim to and in the said judgments referred to in the within assignment thereof.

“As witness my hand and seal this 4th day of March, 1872.

“Signed, sealed, and delivered, in the presence of

“THOMAS B. MCMAHON.

And the said Southworth Cole, in the said deed poll mentioned, is the plaintiff in this suit, and except under the said deed poll is not the assignee of the matters in the said first count mentioned therein alleged to be assigned to him.

Demurrer to the fifth plea on the grounds:—1. That the plea contains no matter of traverse, or confession and avoidance, which in law is an answer to the defendants action.

2. That under the assignment or deed poll in the said plea set out the plaintiff has a right to maintain this action.

The defendants excepted to the declaration on the grounds:—

1. It is not shewn by the said first count of the declaration that the right of action for the breach of the defendants' covenant in the deed of the 13th of February, 1866, and on which the action is founded, has ever been assigned to the plaintiff.

2. The assignment from the said McMahon to the said plaintiff is not set forth with sufficient particularity.

Joinder.

December 21, 1875, *Fitzgerald*, Q. C., for the demurrer. The question is, whether the defendants' covenant to Fisher, which passed to McMahon, was passed by his assignment to the plaintiff? McMahon assigned "all my right, title, interest, and claim to and in the said judgments referred to in the within assignment thereof;" and the within assignment so referred to is the assignment from Fisher to McMahon, which was of "the said several judgments, and the said assignment to the said John Fisher and all benefit to be derived therefrom, either at law or in equity or otherwise howsoever." The defendants say the covenant of the defendants did not pass to the plaintiff. It does not by express terms, but it does so in fact and in law, for McMahon transferred all his right, interest, and claim *to and in* the judgments to the plaintiff, and that applies to the defendants' covenant, which is a security for the judgments. *To and in* the judgments means, *in respect of them*. The assignee of a chose in action is governed by the equities between the parties: *Smith v. Parkes*, 16 Beav. 115, 119; *Cockell v. Taylor*, 15 Beav. 103; *Priddy v. Rose*, 3 Mer. 86; *Ord v. White*, 3 Beav. 357. The defendants having covenanted that the judgment in question was not at the time of their covenant paid, are estopped from pleading that it was paid before that time.

Fitch, contra. The only thing which was assigned to the plaintiff was McMahon's right to the judgments; the defendants' covenant was not transferred: *Prosser v. Edmonds*, 1 Y. & C. 481, 496. The covenant sued upon was, as the plea shews, broken before the covenant was made, and a broken covenant while Fisher was the assignee of the judgments and entitled to sue for the breach of covenant could not be transferred by him to McMahon, nor by McMahon to the plaintiff: *Wellington v. Chard*, 22 C. P. 518; 35 Vic. ch. 12, O.; *Addison on Contracts*, 4th ed., 979, 983, 7th ed. 311, 322. There can be no estoppel because an interest did, it is admitted, pass in and to two of the judgments; defendants may shew

also that no interest passed from McMahon to the plaintiff in the judgment in question, because McMahon does not bind himself that he had any right in or to it, as he only transferred "all his right and title," which does not bind him in any way that he had any right or title, and that point is open to the defendants to take: *Doe d. Christmas v. Oliver*, 2 Smith L. C. 751.

Fitzgerald, Q. C., in reply. The case of *Prosser v. Edmonds*, 1 Y. & C. 481, has been qualified by later cases: *Dickinson v. Burrell*, L. R. 1 Eq. 337, 342.

January 18, 1876. WILSON J.—The assignment of the judgments by Downs, the plaintiff, who recovered them, to Westlake; and by him to Greer for the defendants, and the later transfers made until they or such of them as were valid came to the plaintiff, passed the property in them and the right to the money due upon them to the respective assignees in equity.

All the assignments were made before the 35th Vic., ch. 12, came into operation.

It is not very plain that it relates to assignments made before it took effect.

The first section by itself has not a retrospective effect. The second section, I think, has; and the third section, I am inclined to think, does make the first section retrospective.

It is, "*Assignee*" [spoken of in the first section] "shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys or the charge, lien, incumbrance, or other obligation thereby secured."

The parties did not raise any question on the statute.

The assignment was always valid in equity, and at law also; but while the assignee could enforce it in his own name in equity, he could do so at law only in the name of the original party.

If the judgment in question were paid to the defendants before they purported to assign it to Fisher, and it is admitted as a fact that it was so, as it is distinctly alleged in the plea, then no interest in it did pass or could pass to Fisher on the 13th of February, 1866.

The assignee of a chose in action, by the rule in equity, takes it subject to all the equities which subsisted against the assignor. He could not give more than he had; and the statute makes no change in that respect.

If, therefore, the judgment in dispute were paid while the defendants were the assignees of it, they had no interest or claim upon it to transfer to Fisher when they made the instrument of assignment to him. *Turton v. Benson*, 1 P. Wms. 495; is expressly in point.

All that Fisher got from the defendants as to this particular judgment was, their covenant that it had not been paid, and that the defendants would not receive payment of it, or do anything to prejudice Fisher's right to recover upon it.

That covenant conferred upon Fisher a legal right of action against the defendants for the breach of it, for it was broken as soon as it was made, and it conferred no more.

And according to *Prosser v. Edmonds*, 1 Y. & C. 481, the transfer of a mere right to sue is void in equity.

If it can be held that the transfer of the judgment which Fisher and the others claiming title from him believed they were making, and which they assumed in good faith to make as an actual and available transfer of the judgment, carried along with such transfer the remedy on the covenant against the defendants, the plaintiff's title will be valid in equity, and it was so at the time it was made to him before our statute relating to choses in action took effect, and will distinguish it from *Prosser v. Edmonds*, 1 Y. & C. 481.

A voluntary settlement of property made after the settlor had given a deed of it which was voidable in equity, was held not to be objectionable on the ground of champerty. For the persons taking under the second deed got

an interest in the property, and it was held sufficient, although they could get the benefit of it only upon vacating the prior deed in equity. It was not the right of suit alone which they got, that right was incident to the property which was transferred to them: *Dickinson v. Burrell*, L. R. 1 Eq. 337.

The case of *Prosser v. Edmonds*, 1 Y. & C. 481, and the others before mentioned, distinguish between the mere purchase of a suit or right to institute one, and the case of the right of suit being merely incidental to the right which is transferred.

Whoever takes the assignment of a chose in action from the assignee of it, will, however just or right his own claim may be as between him and his assignor, lose his right if his assignor's title can be impeached and is set aside at the instance of the original party, which is a result dependent upon the rule that the assignee of a chose in action takes it subject to the equities between the original parties. *Cockell v. Taylor*, 15 Beav. 103.

Now certainly Fisher got no more than a right to bring an action against the defendants so far as the disputed judgment is concerned. That is all he could give in reality to his assignees, and it is all, at the most, which the plaintiff got. But it does not appear to me that Fisher or his assignee was guilty of champerty or maintenance. The one professed to sell and the other to buy the judgment, and they both believed they had the title and interest in the subject of assignment which would constitute a valid transfer of it, and it was such a transaction they believed they were carrying into effect and which they desired to complete, the transfer of the judgment being the principal subject of transfer and the right of suit in respect of it being incidental to it only.

In such a case the rule on which *Prosser v. Edmonds*, 1 Y. & C. 481, was based that the purchase of a law suit is void as opposed to public policy, cannot apply, for there was no public policy violated, nor desired nor intended to be violated by Fisher or those claiming under him.

So far I have considered the case as governed by equity law antecedently to and irrespective of the choses in action statute.

Whether an assignment void or voidable before the passing of that Act can be made good by that Act, or whether the Act enables transactions which would have been invalid before it to be entered into and made effectual now may be questions.

I am of opinion that the proposed transfer of this judgment and the covenant accompanying it, were together a chose in action at the passing of the statute.

The statute 35 Vic. ch. 12, sec. 1, O., declares that "*Every* debt and chose in action arising out of contract shall be assignable;" and as the Act is retrospective and the assignment by Fisher to McMahon was "a chose in action arising out of contract," I am of opinion it is within the operation of the Act to enable the plaintiff to sue in his own name if his covenant has passed to him by the assignment in the plea set out. The plaintiff's assignor acquired the right to sue the defendants on their covenant, and he assigned to the plaintiff "all my right, title, interest, and claim to and in the said judgments," and it was written on the back of the assignment from Fisher to McMahon.

McMahon could not certainly bring an action on the covenant for his own benefit after assigning all his interest in the alleged judgment to the plaintiff; and there can be no reason why the plaintiff, who has all McMahon's right, title, and interest in and to the judgments, should not also have the right to the covenant which is a part of his right, title, and interest in and to the judgment. I am of opinion the plea does not shew a valid defence, and that the declaration is sufficient in law.

Judgment for plaintiff.

From the foregoing judgment the demurrer came on before the full Court, by way of rehearing, on February 14, 1876.

Osler, with him *Fitch*, for the rehearing. They cited, in addition to the authorities cited below, *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Wallace v. Gilchrist*, 23 C. P. 04; *Blair v. Ellis*, 34 U. C. R. 466; *Huskinson v. Robinson*, 350.

Fitzgerald, Q. C., contra.

The argument in other respects was similar to that before Wilson, J.

May 15, 1876. WILSON, J.—The demurrer was argued before me while sitting for the full Court, upon which I gave judgment for the plaintiff.

The case has been reheard, but I am not convinced that the defendants are entitled to judgment. I stated, in disposing of the case, that "if it can be held that the transfer of the judgment which Fisher and the others claiming title from him believed they were making, and which they assumed in good faith to make, as an actual and available transfer, carried along with it the remedy on the covenant against the defendants, the plaintiff's title will be valid in equity."

That is the matter to be now determined. The declaration states that the defendants did by deed poll under their common seal transfer to John Fisher and his assigns "all the right, title, claim, property, demand, and interest whatsoever, of the defendants in the said several judgments, * * together with the said assignment," &c; and that the defendants covenanted with John Fisher "that they had not received payment either in part or in the whole upon any of the said mentioned claims, and that they had not made any release or discharge of the same or any part thereof, nor done any matter or thing *since* the same or any part thereof came into their hands whereby the same or any part thereof had become impaired or in any wise affected as a good, valid, and subsisting security for the whole sums so expressed to have been assigned to the defendants in and by the said assignment from the said George Westlake to the defendants; and that they would * * not release or discharge the same without the consent of the said John Fisher * * first had and obtained."

The assignment, together with the covenants of the defendants, constitute an affirmation by them that the judgments were "a good, valid, and subsisting security for the whole sums so expressed to have been assigned to the defendants by the assignment from George Westlake to them," so far as any act of the defendants was concerned. The pleadings shew that the defendants received payment of the judgment in question before they made the assignment to Fisher.

A transfer or conveyance does not necessarily mean that any subjects, lands, goods, or debts, &c., have actually been transferred or conveyed. It may mean only that the grantor is concluded from denying that they have been transferred or conveyed because none in truth have passed.

In the case of a grantor owning the subject which he conveys, the transfer operates by passing the interest of the grantor. In the case of a person professing to own the subject which he assumes to convey, but who does not own it, the transfer passes nothing in fact, simply because the grantor has nothing to give; but it concludes him from denying the effect of his own deed, and from saying that nothing did pass by it, and so, as against him, it operates by estoppel to the extent to which it professes to be a conveyance.

In the one case as well as in the other, the deeds are equally operative between the parties to them, and all persons who are in privity with them. But deeds whereby an interest has passed have a wider operation.

The covenants contained in these two classes of conveyances are equally assignable with the transfer of the principal subjects contained in them, although it was doubted for a time whether a person claiming merely by estoppel could be the assignee of covenants which, if an interest had passed, would have gone to the assignee: *Gouldsworth v. Knight*, 11 M. & W. 337; *Cuthbertson v. Irving*, 4 H. & N. 742.

As a right of action on a covenant in a deed operating by estoppel may pass, although no interest has been trans-

ferred by it in the principal subject, merely by reason of its binding and conclusive effect, it is not correct to say that the covenant cannot be assigned as incidental to the subject assumed to be conveyed, because the subject itself does not in fact exist.

That is to lose sight of the whole doctrine and principle of estoppels.

In this case the bank had no such subsisting judgment to assign as the one in question, which they assumed to assign. It had been paid and discharged before that time.

Yet they did assume to assign it as a valid and subsisting judgment, so far as their own acts were concerned.

If they had assigned fifty shares of their stock, or of any other stock which they would be at liberty to hold—and they had no such stock—and covenanted for their title to it, they could not assert in Court, to an action by their assignee for breach of covenant, that they had no such stock, and that the covenant was therefore void. And that which they could not do at the suit of their immediate assignee, they cannot do at the suit of a more remote assignee, so long as the subject—if existing or subsisting in fact—is capable of being assigned: as lands always were, and as choses in action are now by virtue of the statute.

That, however, although it shews an assignee immediate or remote may sue upon a covenant contained in a deed operating by estoppel, in like manner as if it operated by way of transfer of the interest of the grantor, does not shew that the plaintiff, in whose time the breach of covenant did not happen, is a person who is entitled to maintain this action upon such antecedent breach.

In this case the covenant was broken as soon as it was made. Fisher unquestionably could have sued upon it while he was the holder of it. The question now is, can the plaintiff sue upon it for such breach in his own name?

The case of *Riddell v. Riddell*, 7 Sim. 529, shews the plaintiff, if he cannot sue in his own name, would be at liberty to use the name of Fisher as plaintiff in the action. The common rule is, that the assignee of a chose in action

is entitled to use the name of the assignor, as of right, by virtue of the assignment. It is therefore practically a formal and technical objection, and not one of substance or on the merits, and that appears particularly from the language of Martin, B., in *Martyn v. Williams*, 1 H. & N. 817, in a case of the like nature, but not the like circumstances.

At p. 830, he said: "The only difficulty is, as to who is to be the plaintiff, and it is manifestly a great convenience that the action should be brought in the name of the person who is entitled to the benefit of the covenant, rather than in the name of the original grantors, who would, if they were the proper parties to sue, be mere trustees for the plaintiff, and not themselves entitled to any beneficial interest whatever."

Is this, then, "a purely money demand," which the plaintiff, if he has an equitable title only, can sue for under the Administration of Justice Act, 1873?

I think it is that, at least, and if the aid of that statute should be necessary, that it may be relied upon by the plaintiff as against this merely formal objection.

If this suit were in a Court of equity, relief would be given to the plaintiff at once, as was done in *Riddell v. Riddell*, 7 Sim. 529, in which case the like objection was taken, that the assignee was the plaintiff, while the bill should have been in the name of the assignor. And under section 9 of the Administration of Justice Act, 1873, this action as it now stands might be transferred to the Court of Chancery to deal with the equitable question, and so as to do complete justice between the parties.

I do not think it necessary that the cause should be transferred. In my opinion, the plaintiff can well maintain this action as a purely money demand.

If this were a continuing breach of covenant as for not making a title, and the mere breach of covenant happened in the time of the original covenantee, but no damage happened to him as by eviction or inability to sell the land in consequence of the want of title, his heir, devisee, or assignee, who was actually evicted or otherwise damni-

fied, would be the proper person to bring the action: *Kingdon v. Nottle*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418, affirmed in *Jones v. King*, 4 M. & S. 188.

In *Lucy v. Levington*, 2 Lev. 26, where the covenantee was evicted in his lifetime, and so had himself sustained all the damage that could result from a breach of the covenant, it was held the executor and not the heir was the proper person to sue for the breach of covenant.

In *Kingdon v. Nottle*, 1 M. & S. 354, the action failed, because the personal representative sued while the testator had never been actually but only nominally damnified by the breach of covenant.

The devisee then brought the action, and recovered: *Kingdon v. Nottle*, 4 M. & S. 53.

"The rule," as was said by Lord Abinger, in *Raymond v. Fitch*, 5 Tyr. 985, 995, "that the executor may sue upon every covenant with his testator, broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle*, followed by that of *King v. Jones*, in which cases it was held, that where there are covenants real, that is, which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff."

If the ancestor is evicted "he cannot have an heir or assignee of the land," and so his personal representative alone can sue: *Lucy v. Levington*, 2 Lev. 26; *King v. Jones*, 5 Taunt. 418, per Heath, J., at p. 428; *Kingdon v. Nottle*, 1 M. & S. 354, at p. 366, per Bayley, J.

But as this breach of covenant is not a continuing one, but was broken once and for all by the receipt of money by the bank, it may be the assignee of the covenant cannot sue upon it in his own name, although he is the only one who has been really injured by it, inasmuch as Fisher, the covenantee, sold his right without knowledge, so far as we know, of the breach, and got, so far as we know, value from his assignee, who in his turn, without knowledge of the

breach, got value from the plaintiff. I do not think it necessary to follow this part of the case further, for admitting the plaintiff cannot maintain the action merely as assignee under the choses in action statute, he can, in my opinion, maintain it, and in his own name, as the assignee of a purely money demand, to which he has an equitable title.

It is in truth now a question of parties to the action, whether the suit should be brought by Fisher or by the plaintiff. That being so, and this deed operating by estoppel as against the defendants, confers upon the plaintiff such an interest as against the defendants to the judgment, that he may enforce his equitable claim to the damages for their antecedent breach of covenant in his name; and he is not obliged to bring the action in Fisher's name at law, nor to resort to equity and to file the bill there in his own name. The plaintiff is still, I think, entitled to judgment.

HARRISON, C. J.—I concur, without any doubt, with the learned Judge (Mr. Justice Wilson), in thinking that there was no such thing as champerty or maintenance, either in the assignment from Fisher to McMahon, or from McMahon to the plaintiff.

But as to the remaining point—the right of the plaintiff in his own name to sue at law for the breach of the defendants' covenant to Fisher, I am not entirely free from doubt.

The first count of the declaration contains the following allegations:—

1. That John D. Downs, on 10th December, 1857, recovered a judgment in the County Court of Brant, against Arthur Smith, John McNaught, and Charles Marigold, for £50 13s. 5d. damages, and £9 4s. 6d. costs: that on 24th February, 1858, he recovered the second judgment, in the Queen's Bench, against James H. Rich, and Franklin P. Gold, for £289 6s. 4d. damages, and £8 17s. 7d. costs; and that on 8th March, 1858, he recovered the third, a judgment in the Queen's Bench, against Arthur Smith, John

McNaught, and John A. Wilkes, for £111 6s. damages, and £11 3s. 4d. costs.

2. That Downs did, by deed poll dated 29th January, 1858, assign to George Westlake, "all the right, title, claim, and demand of the said John W. Downs in and to the said claims and demands."

3. That George Westlake did by deed poll, dated 14th October, 1859, assign "the said several judgments" to one Archibald Greer, in his capacity of manager of the branch office of the defendants at the town of Brantford.

4. That the defendants by deed poll, dated 13th February, 1866, did, in consideration of \$150, assign to John Fisher, his heirs, &c., the said several judgments, "as and for his and their own proper moneys and effects absolutely," and did in and by the said deed also covenant "that they (defendants) had not received payment either in part or in the whole upon any of the said last mentioned claims, and that they had not made any release or discharge of the same or any part thereof," &c.

5. That John Fisher did by indenture, dated 22nd January, 1869, assign to Thomas B. McMahon, "the said several judgments, and the said assignment to the said John Fisher, and all benefit to be derived therefrom, either at law or in equity, or otherwise howsoever."

6. That Thomas B. McMahon did by deed poll, dated 4th March, 1872, assign to the plaintiff "the matters aforesaid."

The breach alleged is, that the defendants "did (not saying when) receive payment in part of the claims or judgments mentioned in the deed bearing date 13th February, 1866, to wit, payment of the County Court judgment, and did release and discharge part of the said claims, to wit, the said judgment."

The plea demurred to is to the effect that the payment of the judgment in the County Court was received before 13th February, 1866 (the date of the assignment from defendants), and that the assignment from McMahon (which was endorsed on the assignment from Fisher to McMahon)

was as follows: "For valuable consideration to me in hand paid by Southworth Cole, of Brantford, fanning-mill maker, I hereby assign, transfer, and set over unto the said Southworth Cole, his executors, administrators, and assigns, all my *right, title, interest, and claim to and in the said judgments*, referred to in the within assignment thereof," and that, except under the said deed, the plaintiff is not the assignee of the matters in the first count mentioned.

The deed from the defendants to Fisher, dated 13th February, 1866, contains two things:—

1. A transfer of their right, title, interest, and claim in or to the "*judgments*."

2. A covenant that they had not received payment of the judgments or any of them.

It now appears from the pleas that at the time of the execution of the deed defendants had received payment of the County Court judgment, so that the attempted transfer of it was, unless on some principle of estoppel, inoperative.

The only really operative part of the deed is the covenant of the defendants that they had not received payment of the judgments or any of them, which covenant was as regards the County Court judgment broken as soon as made.

There can be no doubt as to the right of Fisher, on the facts appearing, to sue the defendants for breach of that covenant.

The first question is, whether it sufficiently appears that Fisher had so assigned *that right*, that it has since by mesne assignments become vested in the plaintiff, so as to entitle him under 35 Vic. ch. 12, to sue thereon in his own name.

All that Fisher, in express language, assigned to McMahon, according to the declaration, was "the said several judgments, and the assignment to (him,) the said John Fisher, and all benefit to be derived therefrom, either at law or in equity," &c.

All that McMahon assigned to the plaintiff was, according to the declaration, "the matters aforesaid," which is qualified by the plea shewing that all that was assigned

was "all his right, title, interest, and claim *to and in* the said *several judgments* referred to in the within assignment thereof."

It is asserted by the plaintiff that although the covenant is not mentioned, although there is no transfer in express language of the right to sue upon it, yet that the latter is incident to the transfer of the debt which did take place, and so by operation of law the plaintiff has the right to sue on the covenant.

There is no doubt that in equity, where debts and choses in action arising out of contract have long been assignable, so as to enable the assignee to sue in his own name, that the assignee is entitled to the full benefit of collateral securities, unless it is otherwise agreed between the parties: *Story's Eq. Jur.* 11th ed., sec. 1047*a*, and that this rule extends even to mortgages on real estate, for as said by Lord Mansfield, in *Martin v. Mowlin*, 2 Burr. 969, 979. "A mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land along with it to every purpose."

But the difficulty I feel in this case arises from the admission by the demurrer to the plea that at the time the deed was executed there was as regards the County Court judgment no debt to assign, no debt assigned, and so nothing whatever to which the covenant can be said to be incident.

The first section of the statute 35 Vic. ch. 12, O., declares that "Every *debt and chose in action* arising out of contract, shall be assignable by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract": Sec. 1.

The third section declares that 'Assignee' shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and give an effectual discharge for the moneys, or the charge, lien, encumbrance, or other obligation, thereby secured."

The sixth section declares : " In case of any assignment in writing as aforesaid, and notice thereof given to the debtor or other person liable in respect of a chose in action arising out of contract, the assignee shall have, hold, and enjoy the same, free from any claims, defences, or equities which might arise after such notice as against his assignor."

Before the passing of this Act debts and choses in action, arising out of contract were not assignable at law so as to enable the assignee to sue thereon in his own name. See *Fairlie v. Denton*, 8 B. & C. 395 ; *Eakins v. Gawley*, 33 U. C. R. 178.

The equitable rule that the assignee can enforce the original contract in his own name, was probably intended by the Legislature to be now the rule at law, and there seems little use in maintaining any distinction since the passing of the statute 36 Vic. ch. 8, the Administration of Justice Act of 1873. Per Richards, C. J., in *Blair v. Ellis*, 34 U. C. R. 466, 468.

The Act applies to assignments made before as well as since the passing of the Act: *Wallace v. Gilchrist*, 24 C. P. 40. The assignment must be in writing. See *Ritter v. Stevenson*, 7 Cal. 388 : must be so effective that the assignee may sue on the debt or chose in action in his own name : sec. 1 : may be of part of a debt without the securities therefor: *Wellington v. Chard*, 22 C. P. 518 : may be made by a man to himself and another: *Blair v. Ellis*, 34 U. C. R. 466 : and may be so expressed that the assignee shall not have the right to sue thereon in his own name : *Hostrawser v. Robinson*, 23 C. P. 350.

The Act intends that the assignment shall be of something called a debt or chose in action, which the party "may have, hold and enjoy." The assignment must be such as to pass "the beneficial interest" in that something. And the person to whom it is passed is to have "the right to receive and give an effectual discharge for the moneys, or the charge, lien, encumbrance or other obligation thereby secured." Besides, if necessary, he shall "sue thereon" in his own name ; and, in the event of suit, is to have such

relief "as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province."

All these provisions indicate that the thing to be assigned, called "a debt" or "chose in action," must be something actual or potential, something real and beneficial. See *Robinson v. Macdonnell*, 5 M. & S. 228. And when so all collateral securities would, at all events in equity, pass as incidental thereto.

The substantial subject matter of the assignment is a debt or chose in action, *i.e.*, an existing debt or existing chose in action. Every debt may be said to be a chose in action, but there may be choses in action arising out of contract other than debts. It is necessary, if possible, to get a clear understanding as to the meaning of these words "debt" and "choses in action arising out of contract." Debt means something due. But what is the meaning of "chose in action arising out of contract?" Chose in action is a phrase which is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject matter of that right, or with regard to which the right is exercised, but it more properly includes the idea of the thing itself, and of the right of action as annexed to it. See *Brown's Law Dictionary*, "Chose." See also *Ex parte Bolland*, *Re Clint*, L. R. 17 Eq. 115. In other words, a chose in action is a right by action or suit to recover something from somebody, which right exists in favour of some other body, and that something, for the purposes of 35 Vic. ch. 12, O., is restricted to a debt or claim arising out of contract.

Let us apply these definitions to the assignment from the defendants to Fisher.

On the face of it it describes several distinct and independent choses in action.

1. A County Court judgment debt in favour of *Downs* against *Smith et al.*

2. A Queen's Bench judgment debt in favour of *Downs* against *Rich et al.*

3. A Queen's Bench judgment debt in favour of *Downs* against *Rich et al.*

4. A covenant in favour of Fisher, made by and against the defendants.

The demurrer to the plea admits that the first of these was discharged, had no existence, and must therefore be treated as if not in the assignment. Now, if there was no debt assigned, it cannot be said, so far as that supposed debt is concerned, that there was a chose in action assigned. And if no debt or chose in action was assigned, there can be nothing to which, as regards the supposed County Court judgment, the covenant can be said to be an "incident."

The assignee cannot of course sue "thereon," *i. e.*, on the County Court judgment, in the face of his admission that it was paid before he procured the assignment of it.

The purchaser of a debt or chose in action arising out of contract, takes it subject to all the equities between the parties. See *Cockell v. Taylor*, 15 Beav. 103, 118; *Dickinson v. Burrell*, L. R. 1 Eq. 337, 343.

Hence, if a man should assign over a satisfied bond as a security for a just debt, the assignee could not sue on the bond in equity, which being satisfied before could receive no new force from the assignment: *Turton v. Benson*, 1 P. Wms. 496. Where an equitable interest is assigned, the party assigning must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument: *Prosser v. Edmonds*, 1 Y. & C. 481, 496. But where nothing is assigned, the assignee is the assignee of nothing: *Hill v. Boyle*, L. R. 4 Eq. 260.

The assignment from the defendants to Fisher, on the face of it, contains four choses in action, that is to say, three judgment debts, and the covenant of the defendants. The subsequent assignments contain, on the face of them, only three choses in action, that is to say, the three judgment debts. But as to these, by the admission of the plea, there was no judgment debt assigned. What was required in

each of the assignments was a transfer not merely of the choses in action called judgment debts, but a transfer of the chose in action consisting of the defendants' covenant. This appears *only* in the transfer from the defendants to Fisher. It does not appear in any of the subsequent assignments. The right to sue "thereon," in the words of the statute, is not therefore in the plaintiff.

The right to sue on this covenant cannot, it seems to me, be looked upon as a mere incident in the transfer of the judgments. It is something which may operate when there is no right whatever to sue on the judgments. If an incident, it would in such a case be an incident without a principal. It is really itself a principal—a chose in action arising out of contract,—which might have been assigned in writing under the statute.

The question, therefore, if the defendants are not estopped from shewing that the County Court judgment was satisfied, becomes narrowed to the enquiry whether the writing does transfer it. The writing is before the Court. By it McMahon transfers all his right, title, interest, and claim to and in the said judgments—that is to say, he transfers the judgments, and all his right, title, interest, and claim to and *in them*. His right, title, interest, and claim in a satisfied judgment amounts to nothing.

But I incline to the opinion that, defendants having by deed assigned the judgment to Fisher as unpaid, and having in and by the deed covenanted that they had not received payment either in part or in whole upon the same, and had not made any release or discharge of the same, or any part thereof, are by the deed concluded from now averring, either against Fisher, or an assignee claiming under Fisher, that at that time the judgment was satisfied and discharged, so that on principles of estoppel, as against the defendants, there would be something assigned to which the covenant might probably be said to be incident.

If there be a technical difficulty in the way of the plaintiff suing under 35 Vic. ch. 12, O., at law as assignee of the covenant, when in truth he is not assignee of that chose

in action, it would seem that he has a good right in equity to compel Fisher, if necessary, to allow his name to be used at law for the purposes of the suit. See *Riddell v. Riddell*, 7 Sim. 529, 533. This shews that the plaintiff, who has the beneficial right, has a good equitable if not a good legal right to enforce the covenant against defendants. And the demand which, under the circumstances enures against defendants, may be properly described as "a money demand," or "purely money demand," within the meaning of section 2 of the Administration of Justice Act of 1873.

I confess I am unable at present clearly to draw the line apparently intended to be drawn by the Act, between "money demands" and "purely money demands." I do not yet see my way to give full force to the adjective "purely." Whenever adjectives of any kind are used in Acts of Parliament, or writings demanding legal precision, it is not at all times easy to make a proper use of them. For example, negligence "is a term well known to the law." But "gross negligence" is a kind of negligence that never yet has been precisely defined. One of the best definitions that I have seen of it is, that it means "negligence with the addition of a vituperative epithet." Per Rolph B., in *Wilson v. Brett*, 11 M. & W. 113, 115.

The demand of the plaintiff here is for money, and for money purely and simply. For this money the plaintiff either has the right to sue defendants in his own name, or to use the name of Fisher for that purpose.

It appears to me, that his claim may therefore be held to be "a purely money demand" under the 36 Vic. ch. 8, sec. 2, and one which this Court can and therefore ought itself to deal with. The decision of Mr. Justice Wilson will be affirmed with costs.

MORRISON, J.—I assent to the judgment in favour of the plaintiff on this demurrer with much hesitation; and I do so, as I do not feel strongly enough to dissent.

Judgment for plaintiff.

ELIZABETH MUNROE, BY MCKAY MUNROE, HER NEXT
FRIEND, v. JAMES G. ABBOTT.

*Malicious prosecution—Reasonable and probable cause—Pleading—
Information—Variance—Excessive damages.*

The declaration for malicious prosecution alleged that defendant charged the plaintiff with having unlawfully and maliciously set on fire the defendant's premises. The information, produced at the trial, was, that defendant's premises were set on fire, that he had reason to believe they were set on fire by the plaintiff; and prayed that she might be held to answer "the said charge." A verdict having been rendered for the plaintiff for \$1000 :

Held 1, on the facts stated below, that there was evidence of want of reasonable and probable cause.

2. That the declaration, after verdict, though not sufficiently precise, might be held to import a crime.
3. That there was a variance between the declaration and evidence, the information not charging any crime; and *Quare*, whether if amended to suit the information the count could be good.

The Court, considering the damages excessive, allowed the insertion of a count in trespass in lieu of that in case, if the plaintiff would consent to reduce the verdict to \$300; and if not, granted a new trial on payment of costs, with leave to the plaintiff to amend.

THIS was an action for malicious prosecution.

The declaration, which contained only one count, averred that the defendant falsely and maliciously, and without reasonable or probable cause, appeared before a justice of the peace in and for the county of Simcoe, and charged the plaintiff with having unlawfully and maliciously set on fire the defendant's premises, and upon such charge procured the said justice to grant his warrant for apprehending the plaintiff, and bringing her before the said justice to be dealt with according to law; that under and by virtue of the warrant the plaintiff was arrested and imprisoned, and afterwards brought before a justice, who dismissed the charge, and discharged the plaintiff from custody—*per quod*, &c.

Plea. Not guilty.

The cause was tried at the last Fall Assizes for the county of York, before Morrison J., and a jury, when a verdict of \$1,000 was rendered for the plaintiff.

The information, which was sworn by defendant on the 23rd of April, 1875, at Barrie, in the county of Simcoe, charged that during the winter of 1871 the informant's premises in the village of Bradford, were "set on fire;" that he had reason to believe that the said premises were "set on fire by one Elizabeth Munroe, then a servant in his employ;" and prayed that Elizabeth Munroe might be held to answer to "the said charge."

The magistrate was called as a witness for the plaintiff. He proved the information and the issue of a warrant for the arrest of the plaintiff, dated 23rd of April, 1875, and that on the following day the plaintiff appeared before him in custody, and was, at the request of the defendant remanded until the 26th of April, on which day some evidence was adduced, and the plaintiff further remanded until the 29th of April, on which day the evidence was closed and the charge dismissed.

The plaintiff was called as a witness in her own behalf. She had been servant in the employment of the defendant at Bradford. She became his servant in the summer of 1869, and remained in his service for about a year. While she was in his service, in the month of February, a fire occurred at his house. The fire was in the parlour. She at the time was washing the breakfast dishes in the kitchen. The defendant and his wife came out of the parlour just before the fire started. The defendant's wife first told plaintiff of the fire, and the plaintiff at once at her request went to have the town fire alarm bell sounded. The supposition at the time was, that a spark had come from the damper of a stove in use in the parlour, and ignited one of the curtains in the room. There was no charge of any kind made at that time against the plaintiff, and she continued in the service of the plaintiff for six or seven months thereafter. She left because she obtained an advance of wages.

The plaintiff heard nothing more about the fire till the 23rd of April, 1875, the day on which the information was sworn. On that day she was on a train of the Northern

Railway going north to Barrie, where she was then at service. The defendant was on the same train. He then told a passenger he was going to have the plaintiff arrested. When the train stopped at Barrie the defendant called for a constable to arrest the plaintiff. A constable thereupon at defendant's instance arrested the plaintiff. She was on the same day lodged in Barrie gaol and detained there under remands till the 29th of April, when, as already mentioned, the charge was dismissed, and she discharged from custody.

As soon as she was discharged she was taken in custody on another charge of arson at the instance of the defendant, who telegraphed the prosecutor. On the latter charge she was imprisoned two months awaiting her trial, and was acquitted without the jury leaving the box.

Counsel for the defence at the close of the plaintiff's case submitted that there was a variance between the declaration and the information, and that the plaintiff should be nonsuited.

The learned Judge overruled the objection.

It was next objected that there was no proof of want of reasonable and probable cause.

The learned Judge also overruled this objection.

The defendant then called witnesses.

The first witness called was his wife. She swore she was upstairs at the time of the fire: that just before the fire she had left the plaintiff and defendant down stairs, and she afterwards, and before the fire, heard her husband leave: that she observed a spark come up through the stove brick from the room below, *i. e.* between the stove pipe and the brick: that she at once went down stairs and opened the parlour door: that the curtains of one of the windows were in flames: that this was the window nearest the stove: that there was some but not much fire in the stove: that she and two young ladies who were on a visit extinguished the fire, and that she was wholly unable to account for it: that she had no suspicion of the plaintiff: that she found her in the kitchen washing the dishes, and sent her to have the fire alarm bell sounded.

The defendant was also examined as a witness on his own behalf. He swore that the fire in the stove was burnt down: that the front damper on the stove was shut: that he himself turned down the damper in the pipe: that he then left the parlour leaving the parlour door open: that he had not gone more than ninety paces before he heard the alarm of fire: that he at once returned to the parlour and found the door closed, and the fire in, the curtains: that at the time the fire started the plaintiff was the nearest person to the room in which it started: that he did not then suspect the plaintiff, and that the only way he could account for the fire was, by the escape of a spark from the damper: that afterwards he went to England: that while in England he heard of other fires of which the plaintiff was suspected: that he did not see the plaintiff from the time he returned from England till the day he met her on the Northern Railway train, and that he thereupon lodged an information against her, and had her arrested.

The other occupants of the house at the time of the fire were also examined as witnesses for the defence, but none of them at the time had any suspicion of the plaintiff or stated any new facts.

Counsel for the defence renewed his objections at the close of the defence.

They were overruled.

The learned Judge left the case to the jury, with a charge to which there was no objection made, except the objections made at the close of the case.

The jury found a verdict for the plaintiff \$1,000 damages.

During Michaelmas term, November 17, 1875, *McMichael*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered; or for a new trial, on the ground that the verdict is contrary to law and evidence, and for misdirection, on the following grounds:—that the learned Judge should have ruled there was reasonable and probable cause:

that the evidence did not support the declaration, and there was a fatal variance, the declaration alleging that the defendant swore that the plaintiff had unlawfully and maliciously set fire to defendant's premises, and the information and warrant did not charge that the act was malicious or unlawful; and for excessive damages; or why the judgment should not be arrested, on the ground that no felonious act or breach of the law was alleged as having been charged by the defendant, and therefore no warrant should have issued.

During Hilary term, February 24, 1876, *George Kerr* shewed cause. An action for malicious prosecution will lie, although the indictment preferred by the defendant discloses no offence: *Jones v. Gwynn*, 10 Mod. 214; *Chambers v. Robinson*, 2 Str. 691. This case is distinguishable from *Stephens v. Stephens*, 24 C. P. 424. If necessary an amendment of the declaration should now be allowed: *May v. Footner*, 5 E. & B. 505; 36 Vic. ch. 8, sec. 49, 50.

McMichael, Q. C., contra. The case is governed by *Stephens v. Stephens*, 24 C. P. 424, and according to that case the plaintiff is without remedy. He referred to *Chivers v. Savage*, 5 E. & B. 697; *Smith v. Evans*, 13 C. P. 60; and *Hunt v. McArthur*, 24 U. C. R. 254.

May 15, 1876, HARRISON, C. J.—The first question which arises on the rule is, whether the learned Judge who tried the cause should have ruled that there was reasonable and probable cause.

Reasonable and probable cause is the existence of such facts and circumstances as would excite in the mind of a reasonable man a belief of guilt. See *Paterson v. Scott*, recently before me (a). Good faith merely in making a criminal charge is not sufficient. Mere suspicion cannot in any case amount to reasonable and probable cause. There must be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to

(a) Reported 38 U. C. R. 639.

warrant the belief that the party is guilty of the crime of which he is accused: *Douglas v. Corbett*, 6 E. & B. 511. See also *Dawson v. Van Sandau*, 11 W. R. 516; *Stone v. Stevens*, 12 Conn. 219; *Bacon v. Towne*, 4 Cush. 217; *Hull v. Suydam*, 6 Barb. 83; *Ash v. Marlow*, 20 Ohio 119; *Jacks v. Stimpson*, 13 Ill. 701.

A belief that a given state of facts would constitute a crime when they do not, is not sufficient to create reasonable and probable cause: *Foshay v. Ferguson*, 2 Denio 617; *Hall v. Hawkins*, 5 Hump. 357; *Merriam v. Mitchell*, 13 Maine, 439; *Faris v. Starke*, 3 B. Mon. 4.

In this case, although defendant when he laid the information may have honestly suspected the guilt of the plaintiff, I cannot hold on the evidence that there was any reasonable ground for the suspicion.

The evidence is more consistent with an accidental fire than with a felonious fire. The defendant at the time of the fire was himself of that opinion. He had not then any suspicion whatever that there had been a felonious fire. He certainly had no suspicion whatever of the plaintiff in connection with the fire. The facts which afterwards are supposed to have come to his knowledge, but which are not very clearly proved, were not under the circumstances sufficient to warrant a change of opinion as regards the plaintiff.

The learned Judge therefore was right in ruling that there was a want of reasonable and probable cause.

The second question which arises is, whether the judgment to be entered on the verdict should be arrested, on the ground that no felonious act or breach of the law is alleged as having been charged by the defendant.

The declaration avers that defendant falsely and maliciously, and without reasonable and probable cause, charged the plaintiff "with having unlawfully and maliciously set fire to defendant's premises."

Unlawfully and maliciously to set fire to any dwelling house, any person being therein, is a felony: 32-33 Vic ch. 22 sec. 2, D.,

Unlawfully or maliciously to set fire to any house, whether the same is at the time in the possession of the offender or of any other person, with intent thereby to injure or defraud any person, is a felony : *Ib.* sec. 3.

Unlawfully and maliciously to set fire to any building other than such as in the Act before mentioned is a felony : *Ib.* sec. 7.

The charge is not stated with as much precision as it might and ought to have been, but I think the declaration *after verdict* may be reasonably held as importing crime.

The third question is, whether there is a variance between the declaration and the evidence.

The only statement in the information is, that "the said premises were set on fire by one Elizabeth Munroe," without averring that she set fire "unlawfully and maliciously."

In a declaration for a malicious prosecution it is not necessary to state that there was an information, but where the declaration avers an information the information must be proved as alleged : *Gregory v. Derby*, 8 C. & P. 749.

And per Patteson, J., p. 750, "If the party was never apprehended, no action at all would lie. The information here is material, to shew that the defendant set the magistrate in motion. It was not necessary to have stated in the declaration that there was an information. It would have been enough to have stated, that the party procured the warrant to be issued. But here the information is stated as the mode in which the defendant set the magistrate in motion, and of that information there is no legal evidence. The plaintiff must therefore be nonsuited."

The decision in this case was approved and followed in *Nourse v. Foster*, 21 U. C. R. 47.

In *Leigh v. Webb*, 3 Esp. 165, where the declaration charged a felony, and the information on production charged no felony, the plaintiff was nonsuited for the variance.

In *Tempest v. Chambers*, 1 Stark. 67, a similar variance produced a similar result.

In *Smith v. Evans*, 13 C. P. 60 where the declaration charged a felony, and the information only alleged that the

plaintiff "did abstract * * * a valuable security for money," Chief Justice Richards, at *Nisi Prius*, ruled there was a fatal variance. See further *Davis v. Noake*, 6 M. & S. 29.

Following these cases, we must hold that the second objection, in the absence, of amendment of the declaration, is fatal to the plaintiff's right to recover.

It is a question whether if the count be so amended as to suit the information, it will be a good count.

In *Chamberlain v. Prescott*, (M. T. 1659,) reported in the margin of the 2nd ed. of Sir T. Raymond's Reports 135, for maliciously indicting the plaintiff under 8 Eliz. ch. 2, for procuring defendant to be arrested in another man's name, who disowned the suit, there was a verdict for the plaintiff, and a motion in arrest of judgment on the ground that the action would not lie where the charge was only a trespass in its nature, but notwithstanding the plaintiff had judgment, but this decision was afterwards reversed.

In *Low v. Beardmore*, Sir T. Raym. 135, Twisden, J., said: "In *Chamberlain and Prescott's case*, it was resolved in this Court, that the action lies for such indictment; but the judgment was after reversed in the Exchequer Chamber; but it seemed a hard case if the action should not lie."

In *Saird v. Roberts*, 1 Salk. 14, it was assumed that in order to sustain an action for malicious prosecution, the charge should be of a criminal offence.

In *Jones v. Gwynn*, 10 Mod. 214, 217, Parker, C. J., in referring to the preceding cases said: "I own my opinion to have been, at first, that where the indictment was neither scandalous, nor sufficient, this action would not lie, but upon further consideration I have changed my mind, for the imprisonment, the vexation, and the expense, are the same upon a groundless and insufficient indictment, as upon a good one," &c.

In *Chambers v. Robinson*, 2 Stra. 691, according to the reporter, p. 692, "the Court made no difficulty of agreeing with the case of *Jones v. Gwynn*, and the defendant's

counsel did not seem to think the reason and authority of the case was to be shaken."

In *Wicks v. Fentham et al.* 4 T.R. 247, 248, the Court were according to the report "of opinion that they were bound by *Chambers v. Robinson* and *Jones v. Gwynn*."

See further *Pippet v. Hearn*, 1 D. & R. 266.

In *Mullin v. Elmore*, 4 C. & P. 452, where the charge stated in the declaration was felony, and the objection was a variance between the declaration and the information, Tindal, C. J., said, "upon looking at the charge which is made in the information, it appears it is only one of trespass and not of felony, therefore the first count is not proved. It has been said that the party would be without redress if the declaration could not be supported in that form. But if the first count had been framed simply that the defendant maliciously caused the plaintiff to be arrested, the amount of damages probably would have been the same," &c. The verdict was £150 for the plaintiff.

In *Hunt v. McArthur*, 24 U. C. R. 254, and in *Stephens v. Stephens*, 24 C. P. 424, where none of the preceding cases were cited, the Courts of Queen's Bench and Common Pleas in this Province apparently arrived at a conclusion to some extent at variance with them.

I was, when at the bar, counsel in *Stephens v. Stephens* for the defendant. It is due to myself to state that at the time of the argument I was not aware of the foregoing cases. Had I been aware of them I would most certainly have cited them to the Court, although opposed to my then contention.

A count in trespass is now generally added to the count in case in causes like the present. See *Smith v. Evans*, 13 C. P. 60.

If in this declaration there had been a second count in trespass, we might, in the present state of the authorities bearing on the case, have felt inclined to allow the first count to be struck out of the declaration and a verdict for a reduced amount to rest on the count in trespass.

The damages are, in the opinion of the learned Judge,

who tried the case, very excessive. In that opinion we concur.

If the plaintiff will consent within one calendar month to the verdict being reduced to \$300, the declaration may be amended by the insertion of a count in trespass in lieu of the count in case, and the rule *nisi* be discharged without costs.

But if the plaintiff refuse to consent to the reduction of the verdict as proposed the rule *nisi* will be absolute for a new trial on payment of costs, with liberty to the plaintiff to amend her declaration as she may be advised.

The case is one proper for compromise. We delayed our decision in the interest of both parties in the hope that it would be compromised. In this we have so far been disappointed. But we now again hope that the parties will, after the intimation of opinion which we have expressed, see their way to an amicable adjustment of the matters in controversy (*a*).

MORRISON, J., and WILSON, J., concurred.

Rule accordingly.

(*a*) The parties ultimately compromised on the terms suggested by the Court, that is to say, by the insertion of a count in trespass in lieu of the count in case, and reducing the verdict to \$300.

IN THE MATTER OF THOMAS HOLDEN AND THE CORPORATION
OF THE TOWN OF BELLEVILLE.

By-law—Statement of debt—Statute confirming by-law—Costs.

A rule nisi having been obtained to quash a by-law, the Legislature by a statute declared the by-law valid, and the rule was afterwards argued on the various objections taken, in order to decide who should pay the costs of the application. The municipality were ordered to pay them, on the ground that the debt of the town was not truly stated in the by-law.

Per WILSON, J.—In future in such cases the rule should not be argued; and it would be well to direct in the statute that the petitioners to confirm the by-law should pay all proper costs incurred in any application to quash it.

Osler, in Easter term, 1875, obtained a rule calling on the town of Belleville to shew cause why by-law No. 333 of the said town should not be quashed for illegality, on the following grounds:—

1. That the joining of two separate bonuses to two different and independent objects is illegal.

2. That the rate of $4\frac{3}{4}$ mills on the dollar of the amount of the last revised assessment roll, namely, \$2,888,378, is not sufficient to produce annually the amount required for sinking fund and interest in each year, viz., \$13,750.

3. That the by-law does not truly recite the existing debt of the town, nor does it truly shew the principal and interest separately, nor how such principal and interest were in arrear.

4. That the corporation had no power, for the reasons hereinafter expressed, to grant bonuses to the objects mentioned in the by-law, or to one or either of them; and on grounds disclosed on the face of the by-law, and in affidavits and papers filed.

Or why the by-law, or so much thereof as assumes to grant a bonus of \$50,000 to the Belleville and North Hastings Railway Company, should not be quashed for illegality, on the grounds:

1. That so much of the statute of Ontario, 37 Vic. ch. 38, as enables a municipal corporation interested in securing

the construction of a railway within or beyond the limits of the municipality, is unconstitutional.

2. That it is not shewn in and by the by-law that the corporation of the town of Belleville was, at the time of the passing of the by-law, interested in securing the construction of the said railway, or that the line of the railway would pass through or near any part of the town of Belleville.

3. That the said corporation was not in fact interested as last mentioned, and the line of railway is not in fact intended to pass through or near any part of the said town; and on grounds disclosed on the face of the by-law, and in affidavits and papers filed.

Or why the by-law, or so much thereof as assumes to grant a bonus of \$75,000 to Messrs. Pardee and Lloyd, should not be quashed for illegality, on the grounds:

1. That so much of the statute of Ontario, 36 Vic. ch. 48, sec. 372, sub-sec. 5, as enables a municipal corporation to grant aid by way of bonus for the founding of manufactories within the limits of the municipality, is unconstitutional.

2. That the power is to pass a general by-law relating to some particular branches of industry, and does not authorize the granting of sums of money to particular persons by name, or particular branches of industry.

3. That the building of an anthracite or bituminous coal smelting furnace, for the smelting of iron ore, is not a branch of industry within the meaning of the said enactment; and on grounds disclosed on the face of the by-law, and on affidavits and papers filed.

This by-law, No. 333 of the town of Belleville, authorized the granting of a bonus of \$50,000 to aid the construction of the Belleville and North Hastings R. W. Co., and a further bonus of \$75,000 to Ario Pardee, of Pennsylvania, and Henry C. Lloyd, of Montreal, to aid and assist them in building smelting works in Belleville; and it also provided for raising the sums by loan.

In this term, May 23, 1876. *M. C. Cameron*, Q. C., shewed cause. The figures shew the proceeds of the special rate

would fall short only about \$30 a year of a sum sufficient to pay the yearly interest, and to provide the required amount for the sinking fund to meet the liquidation of the whole amount to be raised by the by-law; and the Court will not interfere in such a case. The debenture debt of the town is \$281,000. The town owed the Merchants' Bank on an overdrawn account about \$67,000, and it deposited with the bank in security for that debt certain debentures which the town had granted for certain purposes, but which still remained in the possession of the town, as they were not properly claimable as yet for the objects for which they had been granted; so that the debt in the bank was in effect covered by the debentures it so held, and these debentures were contained in the sum of \$281,000 of the said debenture debt of the town. The by-law provides for two objects—one to raise \$50,000 for the railway aid, the other to raise \$75,000 for the aid of the smelting works. Such a work is a manufacture within the meaning of the Municipal Act, sec. 248. A by-law is valid, although it is in aid of two objects, and although both these objects have to be voted upon by the ratepayers at the same time: *Harrison's Mun. Man.*, 3rd ed., 198 and notes; *Secord and the Corporation of the County of Lincoln*, 24 U. C. 142.

Osler supported the rule. It is not allowable to provide for two different objects in the one by-law. It is not a fair way of submitting the purposes to the people, one of which purposes may be approved and the other disapproved of. The fact that the special rate will fall short by only a small sum of the required amount will still affect the by-law as much as if the deficiency were a greater sum. The fact now appears that the by-law did not truly recite the debts of the town when it represented the amount as \$281,000, for, in addition to that, there was a debt of \$67,000 then owing to the bank. That it was secured by unused debentures of the town would not make the debt itself any less than it really was. The debentures, although not delivered over for the purposes they were granted for, were still liable only for such purposes, and until they were quite got rid of, they were liable to be demanded by the persons

for whose benefit they were made. Among the debentures so deposited with the bank, were debentures to the amount of \$25,000 for the Grand Trunk, which that company could require to be given over at any time on performance of the condition subject to which they were granted, and the time for performance of that condition had not expired. The by-law, although made valid by the 39 Vic. ch. 50, O., is nevertheless to be treated, so far as the costs of the application are concerned, as if the by-law had not been confirmed.

June 29, 1876. WILSON, J.—This case was argued before my brother Morrison and myself. A little before the close of the argument we learned that it was quite unnecessary we should concern ourselves too much about the fate of this by-law, and about the interests of the railway company, or the smelting company, or even of the ratepayers of the town of Belleville, because all that work had considerably, since the issuing of the rule, been taken off our shoulders by the Legislature—the appellate Court for the rectification and registration of municipal by-laws.

But it appears that although we can do neither good nor harm to any of these great interests by any thing we may do, we are nevertheless gravely to hear and gravely to decide upon every one of the many branches of this rule. for the purpose of making the gratifying disclosure whether we would or would not have quashed the by-law if it had not been confirmed, and in what manner we would, in such a case, have dealt with that most delicate subject—costs.

The Legislature apparently considered the by-law to require confirmation. How easy it would have been, while the bill was in hand, to have added a clause to it, disposing of the costs at the same time.

There is not a paper or document of any kind made after the month of August last. The by-law was confirmed on the 10th February, 1876, by 39 Vic. ch. 50, O. The parties, by their counsel, appeared before us in May afterwards to argue, in effect, which of them should pay a not very large sum, for the expense of drawing a copy of the by-law in dispute, and

some few affidavits for and against it; and by that argument to add somewhat to the costs which they desired to have settled. The amount itself is not large, and we think it is a waste of time that we should be called upon to hear and determine the whole merits of the original application, which judgment will have no other value when given than to stand as a perpetual record, that a few dollars of costs were ordered to change hands, or that it was solemnly declared that there should be no costs to either party.

As I did hear the argument in this case before, I was aware of the virtual disposal of the rule, I will not decline, because I can do so now without the waste of much time over it, to say how I think the costs in the case should be awarded.

I think the town of Belleville should pay them, because the debt was not truly set forth. I make enquiry into no other part of the rule. That is sufficient to dispose of it. It is very probable it might not have been held sufficient, because it did not distinctly specify separately the principal and interest of the debt.

I speak for myself when I say, that in every subsequent case in which the by-law has been confirmed by the Legislature, I shall oppose the hearing of any rule affecting it any way for the mere purpose of determining the subject of costs.

It would be better for the Legislature, when they adjudicate upon the principal subject—the by-law itself—to direct as a consequence, upon the assumption that the by-law which does require to be confirmed is invalid, that the petitioners for confirmation shall pay all proper costs which have been incurred in any application to the Courts to quash it.

It is surely much better to deal with the costs in that manner, than to remit the parties to the Court to go through the farce of an argument, whether a by-law purposely made unassailable is valid or not, when the judgment required must be formally given upon the merits, but is all the while given upon a totally different ground, and for a wholly different purpose.

Considering the sum in dispute, the expensive process resorted to to bring about the result, the useless labour thrown upon the Court, and the waste of public time, I think I may say the play is not worth the candle.

Rule, that the town of Belleville pay the costs of this application, and that the residue of the rule be discharged.

Rule accordingly.

IN THE MATTER OF THE HAMILTON AND NORTH-WESTERN
R. W. CO. AND THE MUNICIPAL COUNCIL OF THE
CORPORATION OF THE COUNTY OF HALTON, JOHN
WALDIE, WARDEN OF THE SAID COUNTY, AND FINLAY
MCCALLUM, TREASURER OF THE SAID COUNTY.

R. W. Co.—Bonus—Mandamus to deliver debentures.

A railway charter provided that on receiving certain petitions the corporation of the county, &c., should submit to the electors a by-law to aid the company by a bonus, and should deliver to trustees the debentures for any such bonus when granted.

The company, as an inducement to the passing of such a by-law, gave a bond conditioned to build their road within a certain time, and to repay the bonus to the county in the event of their ceasing within twenty-one years to be an independent company. Under the facts of this case, set out below, the Court refused a mandamus to compel the corporation to hand over the debentures to the trustees appointed to receive them, there being ground for apprehension, owing to the delay, that the bond could not be performed; but the rule was discharged without costs, and without prejudice to a further application.

Remarks as to the remedy by mandamus, and the effect of there being another remedy available in equity, though not at law. *Semble*, that it is the inadequacy, and not the mere absence of all other legal remedies, coupled with the danger of a failure of justice without it, which must usually determine the propriety of granting or refusing the writ.

Remarks as the proper functions of a legislative body, and the division of legislative power under the B. N. A. Act.

April 25, 1876. *Osler*, in the vacation after Hilary term last, obtained from Hagarty, C. J., C. P, sitting alone, a rule upon reading the copy of a by-law of the county of Halton, intituled "A by-law to aid and assist the Hamilton and North-Western Railway Company, by a grant of \$65,000, by way of bonus, and to issue debentures there-

for," and the affidavits and papers filed, returnable before the full Court, calling upon the county, the warden, and the treasurer to shew cause why they should not forthwith make, sign, seal, execute, and deliver to James Miller Williams, William Eli Sanford, and H. M. Switzer, trustees in that behalf, duly appointed to receive the said debentures under and in pursuance of the statute incorporating the said Hamilton and North-Western R. W. Co., the debentures authorized and required by the said by-law to be issued to the said amount, or why such other order should not be made for the relief of the railway company in the premises, and as to costs, as to the Court might seem proper.

The by-law, which was passed on 28th April, 1874, and was for a rate on certain portions of the county in the by-law described, recited the Acts incorporating the Hamilton and North-Western R. W. Co.; and that fifty persons and upward who were rated on the last assessment roll as freeholders, and who were ratepayers qualified to vote under the Municipal Act in portions of the county described, had, in accordance with the provisions of the said Acts, petitioned the council to pass a by-law granting a bonus of \$65,000 to the company.

The by-law contained the requisite recitals as to the whole amount of the ratable property of the county, and the existing debt of the county and portions of the county proposed to be affected.

It enacted:—

1. That it should be lawful for the portion of the county described to aid and assist the railway company by giving thereto \$65,000 by way of bonus.

2. That the warden or other head of the council should cause the necessary debentures to be issued, in sums of not less than \$100 each.

3. That the debentures should be made payable at the Bank of Hamilton, in the City of Hamilton, and have attached thereto coupons for the payment of interest at the rate and in the manner particularly set forth in the by-law,

which provided for the payments on 1st May in each year, from 1st May, 1875, to 1st May, 1894, inclusive.

4. That the debentures should bear interest at six per cent. per annum from the date thereof, payable half yearly, on 1st May and 1st November in each year, at the Bank of Hamilton.

Then followed a provision for the creation of a sinking fund.

The by-law concluded as follows :—

Provided always, and it is hereby declared, that this by-law is passed subject to the following stipulations and conditions, viz.:

That the said debentures shall be deposited with trustees in the time and manner provided by the charter of the company, and on the terms and conditions that the trustees shall not be at liberty to pay over the proceeds of the debentures except for work done or material delivered within the county, and then only *pro rata* on the certificate of the engineer as provided in the Act of incorporation.

The by-law was submitted to the ratepayers, was approved, and took effect on 2nd May, 1874.

On 12th August, 1873, by resolution, the board of directors of the railway company named and appointed James Miller Williams, of the city of Hamilton, trustee to receive the municipal debentures which had been granted or which might be granted by any municipality by way of bonus to the railway company.

H. M. Switzer was afterwards appointed trustee on behalf of the county and his appointment communicated to the railway company on 12th June, 1874.

Edward Gurney, of the city of Hamilton, was appointed by the Lieutenant-Governor in Council the third trustee, but he afterwards resigned, and William Eli Sandford, of the city of Hamilton, was appointed third trustee in his place.

Notice of the appointment of the latter was published in the *Ontario Gazette* issued on 4th March, 1876.

On 25th August, 1874, W. D. Lyon, the then warden of Halton, wrote to the secretary of the railway company a

letter to the effect that the debentures had been signed by him and were handed over to the treasurer for his signature, and would be completed in a few days.

Applications were from time to time made to the municipal authorities of Halton by the authorities of the railway company for the delivery of the debentures, but the municipal authorities, in consequence of the delay in the commencement of the work, sought before delivering over the debentures to be allowed to cut off the coupons for accrued interest, and declined to deliver the debentures without the coupons being detached from the debentures.

As the works of the railway had not at the time of such application been commenced, and the contracts for the same had not then been let by the railway company, the company did not then feel any necessity for pressing for the delivery of the debentures.

The contract for the construction of the line was not let till 27th November, 1875, to John Proctor, of the city of Hamilton, and thereafter the company found it necessary for the financial purposes of the company, and the prosecution of the works of construction, to have the debentures delivered to the trustees in order that the same might be made available for the purposes of the work.

On 7th March, 1876, the three trustees, according to the affidavits filed on obtaining the rule, went to Milton, appeared before the county council then in session, and demanded the delivery of the debentures under the terms of the by-law, but the council declined to deliver them.

These were the principal facts disclosed in the affidavits and papers on which the rule *nisi* was granted.

The county of Halton filed several affidavits, the principal facts disclosed in which were as follow:—

On 9th March, 1874, previous to the passing of the by-law, the railway company, as an inducement to the passing of the by-law, executed and delivered to the county, a bond conditioned that the company should, within three years from the time the by-law took effect, build and continuously operate

their road, either from the city of Hamilton, over the beach, and thence through the county of Halton, or from some point in or near to Wellington Square, in the event of a temporary arrangement being made with the Great Western R. W. Co., and thence through the county so as to pass near Milton, and also near to Georgetown, or should re-pay to the county of Halton the amount of the bonus, or so much thereof as they might have received, in the event of the company, during the period of twenty-one years, ceasing to be an independent company.

Had it not been for the delivery of the bond the by-law would not have been passed by the council or approved by the ratepayers.

On 19th January, 1876, the president of the company wrote to the warden of the county, proposing that the county or any of the municipalities included in the group granting the bonus, should have the option at any time, on or before 10th April, 1876, of acquiring from the railway company or the trustees the whole or any portion of the debentures, on paying at the time of exercising the the option all interest accrued, and a proportion of the interest upon the current coupon up to date, and ninety-four per cent. on the principal of the debentures.

On 6th April, 1876, the county council passed a by-law intended to authorize the conversion of the debentures to be issued in aid of the Hamilton & North-Western R. W. Co., and the distribution of the same among the contributing municipalities. It, besides accepting the option, provided that the debentures should not pass out of the possession of the county, except as provided in the by-law: that the warden should have power to borrow money on the deposit of the debentures, or to invest any sinking funds of the county in the purchase of debentures: that the moneys for the purchase of the debentures should only be paid on the order of the warden, which should issue after a requisition had been made and a certificate duly attested of the chief engineer of the company that the money required was the ratable proportion due from the county, and that the

amount had been expended in the county for work actually performed or materials actually on the ground.

It was asserted that during the last session of the Ontario Legislature the railway company was seeking legislation of some kind. The county of Halton was opposing the legislation. The letter of 19th January, 1876, was given to the warden of the county by the president of the railway company to secure the withdrawal of the opposition, and had that effect.

The concession made or proposed to be made to the county of Halton was equal to one year's interest on the bonus of \$65,000. The county council ever since the passing of the by-law have been ready to pay the money *pro rata* as provided by the by-law, but not otherwise.

It was represented that the Great Western R. W. Co. had refused the Hamilton & North-Western R. W. Co. the right to cross their rails between semaphores, and would not grant running powers over their rails on terms which the Hamilton & North-Western R. W. Co. would accept. It was also represented that the company had not obtained the authority of the Governor in Council under 39 Vic. ch. 15, D., for bridging the Burlington Canal. It was also represented that the company had not purchased right of way, bought materials, or commenced construction within the county of Halton, except a cutting made on the lands of one Campbell, in 1874, which cutting was afterwards abandoned without payment to Campbell for the injury done to his land. It was further represented that when the company first applied to the county of Halton for a bonus they were chartered with ordinary powers to build a road under certain conditions, from the city of Hamilton to some place on the Georgian Bay: that after the by-law the company got their powers enlarged, by which they were empowered to contract with their own directors for the building of the road; and for the purpose of securing a bonus from the city of Hamilton of \$100,000 to the joint enterprise, the Hamilton and North-Western R. W. Co. amalgamated with what was known as the Hamilton and Lake Erie R. W. Co.; and that the amalgama-

tion endangered the interests of the county of Halton, as the Hamilton and Lake Erie R. W. Co. had liabilities to the amount of \$500,000, and the net earnings of the company were not sufficient to pay interest on the liabilities.

Several demands had been made on the county council for the delivery of the debentures, but on all occasions such demands were met with a refusal, on the ground that a delivery would endanger the interests of the county, and occasion loss to it if the terms of the bond were not carried out, and the officers of the county and ratepayers thought, looking at the long time which had elapsed, and the little work that had been done, there was little likelihood of the construction of the railway in accordance with the bond, so as to warrant the delivery of the debentures. It was also represented that the financial condition of the company is not such that it would be safe for the county to part with the debentures. There was filed an affidavit of Mr. Switzer, one of the trustees, in which he swore that he did not desire the delivery of the debentures, that he never demanded them, and that he did not consider, so far as he had a knowledge of the facts and circumstances, the trustees were entitled to a delivery of the debentures under the terms of their contract with the county.

On behalf of the Railway Co., several affidavits in reply were filed, which shewed that in the bill introduced into the Legislature of Ontario there was nothing detrimental to the interests of the county of Halton: that at the time when the letter of 19th January, 1876, was written, it was understood and agreed that the debentures should be handed over subject to the terms of the letter: that the refusal of the county council on 9th March to deliver the debentures was such a breach of the agreement as warranted the railway company in withdrawing the option contained in the letter: that the option was withdrawn by letter from the company, dated 28th March, 1876: that in the month of January last, immediately after the bill passing a second reading, a contract was made for the purchase of the rails, bolts, and nuts necessary for the

construction of the line from Hamilton to Georgetown, amounting in value to about \$140,000: that already a large quantity of the rails, bolts, and nuts, amounting to the value of about \$100,000, had arrived at Montreal, and was being transported to the county of Halton, and the balance of the iron was being shipped from England: that the whole would be on hand in good time to be used for laying the track of that portion of the line, and would be sufficient for that purpose: that a purchase had also been made of 80,000 ties to be used in laying the track: that the map, or plan and book of reference of and relating to that portion of the company's line lying between Wellington Square station and Georgetown had been duly certified and deposited as required by law: that the financial condition of the company was strengthened to the extent of \$100,000 by the taking of stock to that amount by the city of Hamilton: that the company was financially able to proceed with the work, and had *bond fide* entered into a contract with a substantial contractor for its construction: that the company had already expended upwards of \$70,000: that of this a large proportion had been for surveys, plans, and other works on the company's line: that it was believed that leave to cross the Burlington Canal would be given by the Government: that application had been made for the purpose: that the line of railway would be built and in running order during the present year as far as Georgetown: that due notice had been given to the Great Western R. W. Co. of intention to cross their line at two places described: that the amalgamation with the Hamilton and Lake Erie R. W. Co. was regarded by all competent persons as an advantage to both companies: that the Hamilton and Lake Erie R. W. Co. had been all along able to pay working expenses, and to yield a considerable surplus, which had been applied partly in payment of debts of the company, and had been almost sufficient to pay the interest on the company's indebtedness: that the company's line was intended to extend from the city of Hamilton to Barrie, a distance of about 90 miles, and beyond Barrie to a point on the Georgian

Bay, in the township of Tay, about 30 miles, with a branch extending from near Clarksburgh, in the township of Tecumseth, to Collingwood, a distance of about 35 miles; and it was also intended to extend the line, of what was the Hamilton and Lake Erie R. W. Co., &c., from Jarvis to Port Dover, a distance of about ten miles: that the company had already received the following aid by way of bonus or grant:—

City of Hamilton Bonus	\$100,000	00
“ “ Stock Subscription	100,000	00
County of Halton... ..	65,000	00
Village of Georgetown.....	10,000	00
County of Peel	30,000	00
County of Simcoe.....	300,000	00
Town of Collingwood	17,522	00
Township of Innisfil.....	20,000	00

And from the Government of Ontario a grant of \$2,500 per mile over that portion of the line from Hamilton to Barrie and Collingwood, except as to 44 miles thereof, for which the grant was at the rate of \$3,000 per mile: that the debentures representing the bonus granted by the counties of Peel and Simcoe, the town of Collingwood and the township of Innisfil, had all been delivered to the respective trustees.

June 2, 3, 1876. *C. Robinson*, Q. C., with him *W. A. Foster*, shewed cause, and cited the following cases, *Edwards v. Grand Junction R. W. Co.* 1 M. & C. 650; *Earl of Lindsey v. Great Northern R. W. Co.* 10 Hare 664; *Carlisle v. South-Eastern R. W. Co.*, 13 Beav. 295; *Attorney-General v. Great-Northern R. W. Co.*, 1 Dr. & Sm. 154; *Joyce on Injunctions*, vol. 1, 188; *Brown v. Monmouthshire R. W. & Canal Co.*, 13 Beav. 32; *Brock v. Toronto and Nipissing R. W. Co.*, 17 Grant 425, 432.

Osler and *Bruce* supported the rule, and referred to the following authorities: 31 Vic. ch. 68, secs. 54–58, D.; 35 Vic. ch. 55, secs. 22, 23, 24, as amended by 37 Vic. ch. 44, sec. 3, O.; 38 Vic. ch. 48, 99, 15; 39 Vic. ch. 72, sec. 12, O.; *Canada Car and Manufacturing Co. v. Harris*, 24 C.

P. 380; *Routledge v. Grant*, 4 Bing. 653; *In re London, Huron, and Bruce R. W. Co. and Township of Wawanosh*, 36 U. C. R. 93; *Rex v. Bishop of Chester*, 1 T. R. 404; *Rex v. St. Catharine Dock Co.*, 4 B. & Ad. 360; *Rex v. Archbishop of Canterbury*, 8 East 213, 214.

June 29, 1876. HARRISON, C. J.—The Hamilton and North Western R. W. Co. was incorporated in 1872 by 35 Vic. ch. 55, O.

The company was empowered to construct a railway from such a point near or within the limits of the city of Hamilton, on the shore of Burlington Bay or as near thereto as may be deemed desirable, and continuing the same through the counties of Wentworth, Halton, Peel, and Simcoe, to a point on one of the bays bordering on the township of Tay, with power to continue the same to Lake Nipissing, or to form a junction with the proposed Canada Central or the Canada Pacific Railway, or both of them, and to construct the same in sections and to extend the same to the waters of Lake Simcoe at or near Barrie: section 3.

The capital stock of the company was \$600,000, with power to increase the same in the manner provided by the Railway Act: section 4.

In the case of certain petitions expressing the desire of the petitioners to aid in the construction of the railway by granting a bonus to the company and stating the amount which the petitioners desire to grant and to be assessed therefor, and in case the petition defined the municipalities or portions of municipalities asked to grant the aid, it is made the duty of the municipal council to pass a by-law and submit the same to the vote of the duly qualified municipal electors of the municipality or municipalities or portion of municipality or municipalities defined in the petition:

1. For raising the amount so petitioned for, &c.
2. For assessing and levying upon all the ratable property lying within the section defined in the petition, an annual special rate sufficient, &c.

Provided the by-law be approved of as in sections 226, 227 and 228 of the Municipal Act enacted : section 15.

It is the duty of the warden or other head of the council, upon such petition to call a meeting of the council for the purpose of introducing the by-law and submitting the same to the ratepayers : sec. 16 ; and the submission must be within six weeks after the receipt of the petition : 36 Vic. ch. 84, sec. 5 ; See also 39 Vic. ch. 72, sec. 11.

It is the duty of the council and the warden or other head of the council and other officers to issue the debentures for the bonus thereby granted, and deliver the same to the trustees under the Act within four weeks after the day named in the by-law for the by-law to take effect : 35 Vic. ch. 55, sec. 16, as amended by 37 Vic. ch. 44, sec. 3, O.

It is the duty of the municipality or municipalities interested, within six weeks after the by-law takes effect, to deliver the debentures to three trustees, one to be named by the company, one by the municipality granting the bonus, and one by the Lieutenant-Governor in Council : 35 Vic. ch. 55, sec. 22, as amended by 37 Vic. ch. 44, sec. 3.

The trustees are to receive the debentures in trust :—

1. To convert the same into money.
2. To deposit the amount realized from the sale of such debentures in some one or more of the chartered banks having an office in the city of Hamilton in the name of the Hamilton and North Western Railway Company Trust Account, and to pay the same out to the company from time to time on the certificate of the chief engineer of the company, in the form given, setting out the portion of railway to which the money to be paid out is applied, and the total amount expended on such portion to the date of the certificate : 35 Vic. ch. 55, sec. 23.

The deposits must specify the particular municipality from which the same was derived, and the money in each case be carried to a separate account to be called the Hamilton and North Western Municipal Trust Account, for the county or township, as the case may be : 36 Vic. ch. 84, sec. 8.

The act of any two of the trustees is as valid and binding as if the three agreed: 35 Vic. ch. 55, sec. 24.

Any county in which is or are situate a township or townships or portion of a township which shall grant a bonus or bonuses in aid of a railway company is at liberty to take the debentures issued by the township or portion of township, and in exchange therefor to hand over to the trustees the debentures of the county, on a resolution to that effect passed by the county council, &c.: sec. 25.

It is lawful for any municipality or portion of municipality passing a by-law for aid to declare in the by-law that the debentures shall be delivered to the trustees in the manner and upon the trusts provided for and declared in the twenty-second and twenty-third sections of the Act of Incorporation, or to vary the trust in such a manner as may be agreed on between the council and the company, or to do so by a separate agreement specifying the terms on which the same may be converted into money or delivered to the company, and generally to make such arrangements respecting the conditions or disposition of such bonus as may be found advisable: 36 Vic. ch. 84, sec. 2.

It is lawful for the company to enter into an agreement with any municipality which may grant a bonus, defining the location of the line, the time within which the road shall be completed, and the portions of the railway or branch upon which the bonus shall be expended, the places where stations are to be erected, or such other matters of detail as may be agreed on between the company and the municipality: *Ib.* sec. 3.

So the council of any municipality which has aided or assisted the company, may on the application of the company, in its discretion grant such extension of time as they may think fit for the performance or fulfilment by the company of any works or conditions stipulated for in respect of the aid or assistance: (*Ib.* sec. 4,) or consent to the deviation of the line under particular circumstances: 37 Vic. ch. 44, sec. 9.

The railway, according to the Act of incorporation, should be commenced within two years and completed to the waters of the bays mentioned in the Act of incorporation within five years, and finally completed within seven years from the passing of the Act: 35 Vic. ch. 55, sec. 30.

The time for the commencement of the work was afterwards extended to two years from 29th March, 1873: 36 Vic. ch. 84, sec. 6.

This was substantially the state of the law affecting the county of Halton when it passed the by-law to aid the company to the amount of \$65,000 on the terms mentioned in the by-law and on the undertaking of the company in the bond previously given.

The time for the completion of the railway has been since extended to three years from 10th February, 1876; 39 Vic. ch. 72, sec. 1.

Besides, the company afterwards obtained from the Legislature power to unite with the Hamilton and Lake Erie R. W. Co. as one company, or for either company to acquire the property and the rights of the other: 38 Vic. ch. 48, secs. 6, 7, 8.

The last Act declares that from and after the agreement for union was ratified the two companies should be one company and one corporation by the corporate name assigned to it in the agreement, and be invested with and have all the rights and property, and be responsible for all the liabilities of the respective companies, so that any right or claim which could be enforced by or against either of them may after the union be enforced by or against the company formed by the union: sec. 9. See also sec. 10.

The capital of the new company is to be equal to the capital of the companies united: sec. 11.

All the privileges, powers, rights, and franchises possessed or enjoyed by either of the companies under their Acts of incorporation and amendments in force at the time of the agreement, are continued and to be possessed by the united company: sec. 12.

The Act concludes by a declaration that "Nothing in this Act contained shall alter or contravene the force and effect of any agreement heretofore made or entered into or now existing between the said Hamilton and North-Western R. W. Co. and any of the municipalities which have contributed by way of bonus towards the construction of the said railway; but said agreements shall continue in all respects to be and are hereby declared binding upon said Hamilton and North-Western R. W. Co., and upon any new company formed under this Act, by union, purchase of property and rights, or otherwise, and which shall become entitled to any advantage from or under any such agreement."

The two companies afterwards, by agreement, became united as one company, and the agreement for amalgamation was further confirmed by Act of the Legislature: 39 Vic. ch. 72, O.

Section 12 of the latter Act provided that, "Notwithstanding anything contained in this or any other Act relating to the said company, all agreements heretofore made or entered into between the Hamilton and North-Western R. W. Co., and any municipality which has granted a bonus, * * to aid the said railway or the construction thereof, shall be and are hereby declared to be legal and binding, and the terms, conditions, stipulations, and provisions thereof shall not be in any way altered or affected by this or any other such Act except so far as the same may be affected by the ninth section of the said Act passed in the thirty-seventh year of Her Majesty's reign, chaptered forty-four, as amended by the eleventh section of this Act."

The opposition of the county of Halton to the passing of the last Act was, it is said, stifled by the promise contained in the letter of 19th January, 1876.

An agreement to withdraw or withhold opposition to a bill in Parliament is not illegal, for Courts of equity have enforced contracts founded on such a consideration: *Edwards v. The Grand Junction R. W. Co.*, 1 M. & C. 650;

Earl of Lindsey v. The Great Northern R. W. Co., 10 Hare 664; *Carlisle v. South-Eastern R. W. Co.*, 13 Beav. 295.

But the railway company denies that there was any such agreement, and maintain that the offer contained in the letter of 19th January, 1876, was withdrawn in the letter of 28th March, 1876, and so could not be accepted by the by-law of 6th April, 1876.

A party making an offer may, in general, withdraw it at any time before its acceptance: *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. 653; *Head v. Diggon*, 3 M. & R. 97.

And the acceptance to be binding must be simply an acceptance and not the introduction of new stipulations: *Routledge v. Grant*, 4 Bing. 660; *Jordan v. Norton*, 4 M. & W. 155; *Hutchison v. Bowker*, 5 M. & W. 535; *Duke v. Andrews*, 2 Ex. 290; *Chaplin v. Clarke*, 4 Ex. 403; *McIntosh v. Brill*, 20 C. P. 426.

If the consideration for the promise contained in the letter of 19th January, 1876, was the withdrawal of opposition to the legislation asked for by the company that promise cannot be revoked, but even if it were so the by-law of 6th April, 1876, cannot be held to be an acceptance of it so as to make a binding contract between the municipality and the railway company.

The by-law contains several stipulations not only at variance with the Act under which the first by-law was passed but with the first by-law itself, and in the disposal of the question now before us may be laid aside.

It was the duty of the county council at all events before the passing of the Act of last session to have issued and delivered the debentures for the \$65,000 to the trustees subject to the trusts in the Act declared. See 35 Vic. ch. 55, sec. 22; 37 Vic. ch. 44, sec. 3.

If it were not for the amalgamation of the companies authorized by 38 Vic. ch. 48 and affirmed by 39 Vic., ch. 72, the company, known before the union as the Hamilton and North Western Railway Company would have a right, on shewing performance of conditions pre-

cedent, in some manner to enforce the performance of that duty: See *Luther v. Wood*, 19 Grant 348.

The county municipality decline to perform the duty in favour of the company, now bearing the name of the Hamilton and North-Western R. W. Co., for, among other reasons, that the present company is not the company to whom the aid was promised, but on the contrary is a union of companies one of which is burdened with a debt of a half a million dollars, and the other, until quite recently, has done little more than obtain an Act of some kind each year from the Provincial Legislature.

If there be any duty on the county corporation in the nature of contract, I presume it may be enforced either at law or in equity. See *Re London, Huron, and Bruce R. W. Co. and Township of Wawanosh*, 36 U. C. R. 93.

If there be no such duty, *i. e.* a duty in the nature of contract, and the Court has a discretion to refuse the writ of mandamus, the writ should not be at present granted in this case.

The well known rule is never to interfere by writ of mandamus unless the party making the application has no other specific legal remedy: *Rex v. Barker*, 3 Burr. 1265; *Rex v. Windham*, Cowp. 377; *Rex v. Bishop of Chester*, 1 T. R. 396; *Rex v. Bristol Dock Co.*, 12 East 429; *Rex v. St. Catharine Dock Co.*, 4 B. & Ad. 360, 363.

It is argued by Mr. Osler that this means a specific legal remedy at law, and that a specific remedy in equity is no ground for refusing a writ of mandamus.

This contention is opposed to the view expressed by Mr. Justice Gwynne in the Wawanosh case, where he said, p. 100: "The rights of the railway company to have the debentures, whatever these rights may be, * * appear to me to depend upon matters of contract; and the points urged before me, in opposition to the rights of the railway company, appear to me to be of such a nature that I should not determine them upon an application for a mandamus, which writ should not be issued for the purpose of adjudicating thereunder upon rights arising out of

contract, where the parties have * * an ample remedy, and much more suitable *to be pursued by bill in equity.*"

It is to be observed that the contract in the Wawanosh case, as here, was only signed by the railway company, and not by the municipality.

The decisions in the United States are in favour of Mr. Osler's contention.

It was held by the Supreme Court of Michigan, in *People v. State Treasurer*, 24 Mich. 468, that the existence of possible equitable remedies does not affect the jurisdiction of Courts of law by writ of mandamus, for "they (such remedies) may be regarded in determining the exercise of discretion in allowing the writ, but they can not affect the jurisdiction." Per Campbell, J., *Ib.* 478.

Mr. Justice Nelson, of the Supreme Court of New York, in an earlier case, *The People v. Mayor of New York*, 10 Wend. 395, 396, said, "It is contended that a mandamus is not the appropriate remedy in this case. The proposition is, I believe, universally true, that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice. By 'legal remedy' is meant a remedy at law, and though the party might seek redress in Chancery, that of itself is not a conclusive objection to the application; that may and should influence the Court in the exercise of the discretion which they possess, in granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction."

In *Commonwealth v. The Commissioners of the Alleghany County*, 32 Penn. St. 218, 223, Mr. Justice Woodward, of the Supreme Court of Pennsylvania said: "I need not consider whether he (the appellant) had any remedy in equity, for according to the best authorities both English and American, the existence of an equitable remedy is not a ground for refusing mandamus." See further *Hardcastle v. Maryland & Delaware R. W. Co.*, 32, Md. 32; *People v. City of Chicago*, 53 Ill. 424.

The broad ground on which the writ is granted or refused is stated in *Rex v. Windham*, Cowp. 377, 378, by Lord

Mansfield in referring to the argument of Mr. Kenyon, where Lord Mansfield said: "Mr. Kenyon has said very truly, that where there is no other specific legal remedy to attain the ends of justice the course must be by mandamus, which is a prerogative writ; and the very form of it shews its object to be to prevent a defect of justice. See further, *Rex v. The Severn and Wye R. W. Co.*, 2 B. & Al. 646; *Marbury v. Madison*, 1 Cranch, 49, 137; *Kendall v. The United States*, 12 Peters 524, 613; *Decatur v. The Secretary of the Navy*, 13 Peters 512; *Brashear v. The Secretary of the Navy*, 6 How. 92; *United States v. Seaman*, 17 How. 225, 228.

In *Regina v. Garland et al.* L. R. 5 Q. B. 269, 272, Cockburn, C. J., said: "I rest the refusal of the writ entirely on the special circumstances of the case, and on the ground that, in the exercise of that discretion which we have to grant or refuse the extraordinary process of the Court, we ought to refuse it in the present case." See further *Nicholl v. Allen*, 1 B. & S. 916, 934; *Regina v. The Parish of St. Nicholas, without*, 10 Ir. L. R. 113.

The prerogative writ should not issue merely because the party applying for it would be otherwise remediless. The granting or refusing of the writ, and whether the writ shall be absolute or only *nisi*, must in each particular case rest in the sound discretion of the Court: *People v. Dowling*, 55 Barb. N. Y. 197; *Ex parte Garland*, 42 Ala. 559.

In a case involving numerous questions of law and fact, and where acts of parties connected with it may be valid or void, depending on circumstances which rest on parol proof, it is not usual to grant the writ: *United States v. Commissioner*, 5 Wall. 563.

The conclusion which I draw from the authorities is the same as that of Mr. High in his work on Extraordinary Legal Remedies, ch. 1, viz., that it is the inadequacy and not the mere absence of all other legal remedies, coupled with the danger of a failure of justice without it, that must usually determine the propriety of the exercise of discretion in granting or refusing the prerogative writ of mandamus.

And I agree with Mr. Justice Gwynne in the Wawanosh case, in thinking that the remedy by the prerogative writ of mandamus is not an appropriate remedy for the enforcement of rights arising out of contract. See further *Benson v. Paull*, 6 E. & B. 273 ; *Norris v. The Irish Land Co.*, 8 E. & B. 512 ; *Bush et al. v. Beavan*, 1 H. & C. 500 ; *The State v. Zanesville Turnpike Co.*, 16 Ohio St. 308.

While I am satisfied of the power of the Court to issue a writ of mandamus in the case now before us, I am not satisfied that the case, under all the circumstances, is one proper for the present exercise of judicial discretion in favour of granting the writ.

It may be that the portion of railway mentioned in the bond will be built by the company in accordance with the terms of their bond, but looking at the time that was lost in doing apparently nothing and the little time that is now left for doing what the company agreed to do, I cannot say that the county has no ground for its apprehension that the agreement will not be performed by the time stipulated.

And this is independently of the legal questions arising out of the union of the company to whom the aid was promised with another company having a large amount of debt, but bearing the same name as the company to whom the promise was made, and the efforts of the Legislature of Ontario to prevent all such questions arising : 38 Vic. ch 48, sec. 15 ; 39 Vic. ch. 72, sec. 12.

It is in this view unnecessary to decide either as the power of the local Legislature to pass such Acts or the effect of such legislation if within the power of the local Legislature.

The functions proper of a legislative body are, to make laws for the government of the people, not to make contracts for individual persons or private trading companies, or to transfer such contracts when already made to persons or companies not in being at the time the original contracts were made.

If there be the legislative power to make contracts

for private parties or corporations, it is certainly one that should be sparingly exercised.

We have passed from the time when the power of the Legislature under an unwritten constitution was in all respects supreme, to a time when the powers of the Legislature, like the powers of the executive and judiciary, are by a written constitution circumscribed, although supreme within the limits prescribed: *Re Goodhue*, 19 Grant 366.

It is not easy to realize the change, and adjust our conduct so as to meet it, and the consequence must be, the raising of constitutional questions not only novel but embarrassing—questions which the judiciary must from time to time determine when they actually arise for decision. See *Regina v. Boardman*, 30 U. C. R. 553; *Beard v. Steele*, 34 U. C. R. 43; *Crombie v. Jackson*, 34 U. C. R. 577; *Dow v. Black*, L. R. 6 P. C. 272; *L'Union St. Jacques de Montreal v. Belisle*, L. R. 6 P. C. 31: *Re Slavin and the Corporation of the Village of Orillia*, 36 U. C. R. 159; *Regina v. Taylor*, *Ib.* 183.

In the reading of the British North America Act one cannot fail to observe the distribution of powers into the three great divisions of executive, legislative, and judicial. To avoid conflict, the functions of each must, as far as practicable, be kept separate and distinct within its own sphere. See *Marbury v. Madison*, 1 Cranch 49, 137; *Kendall v. The United States*, 12 Peters 524, 613; *State v. Warmoth*, 2 Am. 712; *Dorsey v. Dorsey*, 11 Am. 528.

The result is, that the rule *nisi* for a mandamus must be discharged, but, under the circumstances, without costs, and without prejudice to a further application if it be hereafter found that there is no adequate remedy elsewhere, and it be hereafter shewn that beyond peradventure the company is justly entitled to have the debentures delivered to the trustees or a majority of them—in other words, that the grounds of apprehension now existing on the part of the county be hereafter shewn to be groundless, and it, at the same time, appear on the facts then disclosed that the ends

of justice will be defeated unless a delivery of the debentures be ordered.

MORRISON, J., and WILSON, J., concurred.

Rule discharged, without costs (a).

CASTOR V. THE CORPORATION OF THE TOWNSHIP OF
UXBRIDGE.

Highway—Obstructions caused by wrongdoers—Liability of corporations.

Municipal corporations are responsible for damage caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge; and the road is out of repair when, by the existence of such obstructions, it is rendered unsafe or inconvenient for travel.

In this case telegraph poles, intended for the construction of their line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by one F. along the road in a sulky in the day time; the had passed several of the poles safely, but both were at the moment looking at an object off the road, and the sulky running against a pole upset and injured the plaintiff. It was proved that the pathmaster knew of the poles being there. The Court being left to draw inferences as a jury:

Held, that the driver was guilty of contributory negligence, and that the plaintiff therefore could not recover, although the defendants would otherwise have been liable.

THIS was action for negligence, brought in the County Court of the county of Ontario. The declaration contained three counts.

The first count was for negligently allowing a public highway in the township, known as the Stouffville Road, to become obstructed and to remain obstructed for a long time by a large cedar log lying and being thereon, whereby, &c.

The second count was in effect the same, but alleged in addition that the road became and was dangerous by reason of the obstruction.

(a) See *In re Stratford and Huron R. W. Co., and The Corporation of the County of Perth*, 38 U. C. R. 112.

The third count, in general terms, complained of the non-repair of the highway, whereby, &c.

Pleas, not guilty, and a special plea amounting to not guilty:

The issues were, pursuant to an order of Mr. Dalton, tried at the Fall Assizes in 1875, for the county of Ontario, before Gwynne, J., and a jury.

The accident happened on the morning of 15th April, 1875, on what is known as the Stouffville Road, and was caused by a telegraph pole which was on that day obstructing the road. The road was proved to be one of the most public thoroughfares in the township. It was turnpiked, and had ditches at each side. The pole, which was lying on, and nearly in a direct line along, the travelled part of the road, was about sixteen feet in length and about ten inches through at the larger end, and seven inches through at the smaller end.

It and other similar poles had been laid for several miles along the highway during the previous month by the Dominion Telegraph Company for the purpose of constructing their line.

It was possible to pass safely by the pole in question on either side of it near the edge of the ditch. The pole was near the centre of the road. There was from seven to eight feet of road on the north side of it, and from ten to eleven feet on the south side of it. The ditches on each side were about ten inches deep. There was no complaint that in any other respect the road was out of repair.

On the day of the accident the plaintiff hired a man named Forsyth, to drive him from a place called Goodwood, in the township of Uxbridge, to a place called Glasgow. Forsyth drove him in a light vehicle called a two-wheeled sulky. They passed without any difficulty several telegraph poles placed along the highway. They would have passed the pole in question had either of them at the time been paying any attention to the road, but both were in conversation and looking from the road at a man who was ploughing by the side of the road. It was not

more than eight o'clock in the morning when the accident occurred.

The plaintiff was the first to observe the pole. He at once called to the driver. The driver, according to the plaintiff's account, at once turned aside to avoid the pole but the pole being crooked the nigh wheel ran on to it and upset the buggy.

The driver cleared the end of the pole about four inches and ran about half the length of the pole before he struck it. He passed the butt end of the pole. The up end was angling to the north. He was driving from the east to the west, and had passed the north end of the pole.

The plaintiff did not see the horse shy at anything, but Forsyth, the driver, swore that the horse did shy. Forsyth was unable to account for his striking the pole otherwise than by the shying of the horse, and he could not account for the shying of the horse otherwise than by a stump near by at the time. He, however, swore that the horse was not one accustomed to shy at stumps.

When the sulky upset, the plaintiff was thrown across the dash-board, or behind the horse under his feet. The horse commenced to kick as the plaintiff fell over. Whether he kicked or stood on the plaintiff, plaintiff was unable to say, but the horse did the one or the other. The consequence was, that the plaintiff sustained a serious injury to one of his legs.

The pathmaster for the year 1874 was called as a witness. He swore that he made his return, and resigned his office in December, 1874, long before the accident; but he afterwards became aware of the situation of the poles. He said there was no complaint about them.

The pathmaster for 1875 was also called as a witness. He received his appointment in March, 1875. He never received any notice about the poles, nor was he aware that there was any complaint about them.

Counsel for the defendants submitted at the close of the case, that there was no case to go to the jury: that if the horse did shy at a stump, the stump was the cause of the

accident: that there was no negligence or non-repair shewn on the part of the defendants, and that there was contributory negligence shewn on the part of the plaintiff.

The learned Judge thought there was very little evidence, if any, to go to the jury, and was inclined to nonsuit, whereupon the plaintiff's counsel consented to the whole case being submitted to the Court as a jury. So the learned Judge entered a nonsuit, reserving leave to the plaintiff to move to set it aside, and to enter a verdict for the plaintiff for such sum as the Court, acting a jury, should direct upon the whole evidence, drawing all necessary inferences.

During Michaelmas term, November 16, 1875, *Howell* obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff for the amount shewn by the evidence, pursuant to leave reserved.

During Hilary term, February 18, 1876, *Campbell* shewed cause. The obstruction on the road was not the proximate cause of the accident: *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308. The evidence was as consistent with the absence as the presence of negligence on the part of the defendants: *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Jackson v. Hyde*, 28 U. C. R. 294; *Henderson v. Barnes*, 32 U. C. R. 176; *Vars v. Grand Trunk R. W. Co.*, 23 C. P. 143; *Ringland v. Corporation of Toronto*, 23 C. P. 98. And there was contributory negligence on the part of Forsyth for which the plaintiff was responsible: *Johnston v. The Northern R. W. Co.*, 34 U. C. R. 432.

Howell, contra. Although the horse shied the accident would not have happened but for the obstruction, which was really the cause of the accident: *Toms et ux. v. Corporation of Whitby*, 35 U. C. R. 195. The obstruction was such as to be a nuisance: 1 *Russell C. & M.*, 4th ed., 485; *Rex v. Cresley*, 1 Vent. 4; *Regina v. United Kingdom Electric Telegraph Co.*, 6 L. T. N. S. 378; *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487; *Rex v. Morris*, 1 B. & Ad. 441;

Rowe v. Corporation of Leeds and Grenville, 13 C. P. 515. The defendants were guilty of negligence in allowing it to remain so long where it was: *Burrows v. March Gas and Coke Co*, L. R. 5 Ex. 67; *Illidge v. Goodwin*, 5 C. & P. 190; *Reque v. The City of Rochester*, 45 N. Y. 129; *Kearney v. The London, Brighton, &c., R. W. Co.*, L. R. 6 Q. B. 759; *White v. Hindley Local Board*, L. R. 10 Q. B. 219; *Shearman & Redfield* on Negligence, 3rd ed., sec. 148. And there was no contributory negligence on the part either of the plaintiff or of Forsyth: *Davenport v. Ruckman*, 37 N. Y. 568; *Tyson v. The Grand Trunk R. W. Co.*, 20 U. C. R. 256. The plaintiff was entitled to a verdict for \$200.

May 15, 1876. HARRISON, C. J.—The first question is, whether there is any duty on the defendants for the violation of which an action will lie for the recovery of damages.

All injuries whatsoever to any highway, as by digging a ditch or making a hedge overthwart it, or laying logs of timber on it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law: 1 *Hawk.* P. C. p. 700.

It is no excuse for one who layeth such logs in the highway that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs, &c.: *Ib.* p. 701.

The rights of the public are thus aptly defined in the language of pleading: to pass and repass on foot and with horses and carriages at their free will and pleasure over the highway. Every obstruction which to a substantial degree renders the exercise of that right unsafe or inconvenient is a violation of that right: per Erle, C. J. in *Regina v. Train*, 3 F. & F. 22, at p. 27.

If the poles were laid in and along the highway by the Dominion Telegraph Company, there can be no doubt that the company might have been indicted for what they did in obstructing the free use of the highway by the public.

There is as little doubt on the authorities that the plaintiff, if he and the driver were free from contributory negli-

gence, would have the right to sue the company and recover damages arising from the unlawful obstruction of the highway : *Butterfield v. Forrester*, 11 East 60 ; *Flower v. Adam* 2 Taunt. 314 ; *Greasly v. Codling et al.* 2 Bing. 263 ; *Marriott v. Stanley*, 1 M. & G. 568 ; *Illidge v. Goodwin*, 5 C. & P. 190 ; *Ridley v. Lamb*, 10 U. C. R. 354 ; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316 ; *Soule v. Grand Trunk R. W Co.*, 21 C. P. 308 ; *Vars v. The Grand Trunk R. W Co.*, 23 C. P. 143 ; *Lake v. Milliken*, 16 Am. 456.

But the question which now arises is, as to the liability of the defendants, the municipal corporation, whose highway in other respects was in proper repair, and who had nothing whatever to do with the placing of the obstruction upon the highway, to be sued for damages arising from the obstruction.

The question is a most important one, and one which, so far as I know, has not yet been absolutely determined in any of the Superior Courts of this Province.

The general rule is, that where a nuisance is wrongfully created by a stranger on the land of another, the owner of the land is not responsible for its continuance unless he in some manner adopt the act of the wrong-doer : See *Rex v. Peddy*, 1 A. & E. 822 ; *Todd v. Flight*, 9 C. B. N. S. 377 ; *Coe v. Wise*, 5 B. & S. 440 ; *Regina v. The Bradford Navigation Co.*, 6 B. & S. 631 ; *Saxby v. The Manchester, Sheffield and Lincolnshire R. W. Co.*, L. R. 4 C. P. 198.

But in the case of a highway, harbour, or other premises, to the use of which the public are invited, where the existence of the nuisance is known to those who have the care of the highway, harbour, or other premises, the continuance of the nuisance, after the lapse of a reasonable time for its removal, may, under certain circumstances, be deemed wrongful and actionable in the event of damage arising from neglect to remove the nuisance : *The Mersey Docks Trustees v. Gibbs et al.*, L. R. 1 H. L. 93 ; *Collins v. The Middle Level Commissioners*, L. R. 4 C. P. 279, 287 ; *Winch v. The Conservators of the Thames*, L. R. 7 C. P. 458 ; S. C., L. R. 9 C. P. 378 ; *Hood v. The*

Toronto Harbour Commissioners, 34 U. C. R. 87; *Campbell v. Portland Sugar Co.*, 16 Am. 503.

In *Davis v. Carling* 8 Q. B. 286, where the declaration charged that defendant was, under the Highway Act (5 & 6 Wm. IV. ch. 50), surveyor of the parish: that gravel had been placed on a highway in the parish, by means of which highway the gravel was obstructed, and the gravel was a nuisance to the public; that the defendant had notice, and was requested to remove the same, but did not within a reasonable time remove the same, whereby, &c.; and it was proved that defendant had notice of the gravel being laid, and neglected to remove it, and that the gravel caused the injury in respect of which plaintiff sued—it was held that defendant under section 109 of the Act was entitled to a notice of action, and on this ground, that he was “charged as a surveyor within the positive act of leaving gravel on the road where it had been improperly placed, for an unreasonable time.” See further *Rich v. Brookfield*, 4 C. B. 783, 802; *Brown v Mallett*, 5 C. B. 599, 607; *Earl of Derby v. Bury Improvement Commissioners*, L. R. 3 Ex. 121.

In *Fareman et ux. v. The Mayor &c. of Canterbury*, L. R. 6 Q. B. 214, where a heap of stones was left by the road side, without light, by persons employed to repair the road, and one of the plaintiffs on a dark night drove against the heap and was upset and injured, the defendants, having general charge of the highway, were held responsible for damages.

In *White v. The Hindley Local Board of Health*, L. R. 10 Q. B. 219, where it appeared that as the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grating put there to drain the surface water off the road into the sewer, but which grating was defective, it was held that the defendants, as the owners of the sewer, of which the grating formed a part, were liable for negligence in not keeping the grating in a proper state of repair.

In *Pendlebury v. Greenhalgh*, L. R. 1 Q. B. D. 36, the action was brought against the defendant as surveyor of

highways, appointed by the vestry of a parish at a salary. The action was to recover damages for personal injuries sustained by the plaintiff by means of a fall from a dog-cart owing to a defective state of the road. The defect arose in this manner: It was ordered by the vestry that about 150 yards of the road should be raised. Defendant contracted with one G to do the labour at $3\frac{1}{2}$ d. per yard, the vestry finding the stones and materials. The work was carried on by raising one-half of the width of the road about a foot, leaving the other half at its old level, and a considerable length of road was thus left without light or fencing; and in consequence the dog-cart of the plaintiff was upset. The plaintiff was held entitled to recover. And per Lord Cairns, p. 41: "If the defendant did not contract for the fencing or lighting, then the duty of fencing or lighting remained in the defendant, for which he remained responsible."

But although the liability to indictment for non-removal may be clear, the liability to be sued by a private individual suffering damage, in the absence of some statute giving the right of action, is not at all clear on the authorities: *Holliday v. The Vestry of St. Leonard*, 11 C. B. N. S. 192; *Coe v. Wise*, L. R. 1 Q. B. 711; *Hartnall v. The Ryde Commissioners*, 10 Jur. N. S. 257 Q. B. 1364; *Parsons v. The Vestry of Bethnal Green*, 17 L. T. N. S. 211, C. P. 1867; *Gibson v. The Mayor, &c., of Preston*, L. R. 5 Q. B. 218; *Harrold v. Corporation of Simcoe et al.*, 16 C. P. 43, S. C., 118, C. P. 1; *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487; *Detroit v. Blakeby*, 4 Am. 450; *Town of Waltham v. Kemper*, 8 Am. 652; *White v. The County of Bond*, 11 Am. 65.

The authorities on the point being doubtful we shall turn to the Municipal Act for the statement of the law there to be found.

Section 407 of the Act vests every public road, street, bridge, or other highway in a city, township, town, or incorporated village, in the municipality, subject to any rights in the soil which the individuals who laid out the road, street, bridge, or highway, reserved.

Section 409 declares that every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

Section 372, sub-sec. 1, authorizes the council of every county, township, city, town, and incorporated village to pass by-laws for appointing such overseers of highways, road surveyors, road commissioners, &c., and such other officers as are necessary in the affairs of the corporation, or for carrying into effect the provisions of the Act of the Legislature.

Section 384, sub-sec. 42, enables the council of every city, town, and incorporated village to pass by-laws for regulating or preventing the encumbering, injuring, or fouling by animals, vehicles, vessels, or other means, of any road, street, square, alley, lane, bridge, or other communication.

It is singular that the latter power, although, as regards obstructions, as necessary in the case of townships as in the case of the other municipalities named, has not by the sub-section in question been extended to township councils, but I apprehend that it is a power which, if necessary, would in the case of townships be implied.

Where a public body is clothed by statute with authority to do an act which concerns the public interest, the execution of the power may be insisted upon as a duty, though the statute creating it be only permissive in its terms: See *Rex v. Barlow*, Carthew, 293-4, 2 Salk. 609; *The People v. Corporation of Albany*, 11 Wend. 539; *Parker v. Macon*, 39 Ga. 725; *Mayor of New York v. Furze*, 3 Hill 612; *Drake v. City of Lowell*, 13 Metc. 292 and cases cited in *Maxwell* on the interpretation of statutes 218-222.

The question is, whether the continuance of the obstruction in this case, without removing it, can be said to be "a default" of the corporation "to keep in repair" the road on which the plaintiff received the injuries, in respect of which he sues.

The enactment ought to receive such fair, large, and liberal construction and interpretation, as will best ensure the attainment of the object of the Act, according to its true intent, meaning, and spirit : 31 Vic. ch. 1, sec. 10 subsec. 29.

The object of the Act is the safety and convenience of the public when lawfully using the highways of the municipality.

We should, therefore, if possible, give to the Act such fair, large, and liberal construction as will best *ensure* the attainment of that object.

When a highway is in such a state from any cause, whether of nature or man, that it cannot be safely or conveniently used, it may in a large and liberal sense be said to be out of repair.

Whether the defect be an excavation caused by nature or man, or an addition making an obstruction caused by nature or man, it may be equally unsafe and equally inconvenient to the public to use the highway.

The statute prescribes no standard of repair, nor does it in any manner declare what is to be deemed non-repair. It would not be practicable for the statute to do so.

It would be absurd to require the municipality to keep all its roads in the same state of repair, or to require the municipality to keep even the same road in the same state of repair during all seasons of the year.

The question whether a highway is in repair or not at the time of the occurrence of an accident is, in general, a question of fact. In the determination of the question, it is necessary to take into account the nature of the country, the character of its roads, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and extent of travel, the place of the accident, and the manner and nature of the accident : *Colbeck et ux. v. Corporation of Brantford*, 21 U. C. R. 276 : *Caswell v. St. Mary's, &c., Road Co.*, 28 U. C. R. 247 ; *Regina v. The Board of Guardians of the Epsom Union*, 8 L. T. N. S. 383 ; *O'Connor v. Corporation of Otonabee*, 35 U. C. R. 73 ; *Hutton v. Corporation of Windsor*, 34 U. C. R. 487.

It has been held that the defect must be such as to render the corporation liable to be indicted for a nuisance: *Ringland v. The Corporation of Toronto*, 23 C. P. 93; *Ray v. The Corporation of Petrolia*, 24 C. P. 73. See further *Howard v. The Inhabitants of North Bridgewater*, 16 Pick. 189, and *Merrill v. The Inhabitants of Hampden*, 26 Maine 234.

There is much resemblance between the enactment on the subject contained in our Act and the enactments contained in the statutes of each of the neighbouring States of Connecticut, Maine, Massachusetts, New Hampshire, and Vermont.

The Connecticut statute, in substance, is, that the municipalities shall make and keep in good and sufficient repair all the needful highways, &c. See *Dillon*, 2nd ed. sec. 786 note. And under this statute it has been held that it is the duty of the municipalities concerned to remove obstructions made by others. See *Manchester v. The City of Hartford*, 30 Conn. 118; *Jones v. The City of New Haven*, 34 Conn. 1.

The Maine statute, in substance, is, that all highways, &c., are to be "kept in repair and amended from time to time, that the same may be safe and convenient for travellers," &c.; *Dillon*, Mun. Cor., 2nd ed., sec. 786, note. And under this statute it has been held that it is the duty of the municipalities concerned to remove obstructions made by others. See *Springer v. The Inhabitants of Bowdoinham*, 7 Maine 452; *Johnson v. The Inhabitants of Whitfield*, 18 Maine 286; *French v. The Inhabitants of Brunswick*, 21 Maine 29.

The Massachusetts statute, in substance, is, that all highways, &c., are "required to be kept in repair at the expense of the town, &c., so that the same may be safe and convenient for travellers," &c.: *Dillon*, Mun. Cor., 2nd ed., sec. 786, note. And under this statute it has been held that it is the duty of municipalities concerned to remove obstructions made by others: *Bigelow v. The Inhabitants of Weston*, 3 Pick. 267; *Currier v. The Inhabitants of Lowell*, 16 Pick. 170; *The Inhabitants of Lowell v. Boston and*

Lowell R. W. Co., 23 Pick. 24; *Snow v. The Inhabitants of Adams*, 1 Cush. 443; *Bacon v. The City of Boston*, 3 Cush. 174; *Fitz v. The City of Boston*, 4 Cush. 365; *Cogswell v. The Inhabitants of Lexington*, 4 Cush. 307; *Collins v. The Inhabitants of Dorchester*, 6 Cush. 396; *Raymond v. The City of Lowell*, 6 Cush. 524; *Davis v. The Inhabitants of Leominster*, 1 Allen 182.

The New Hampshire statute is, in substance, that "in case any special damage shall happen to persons or their teams or carriages by means of the insufficiency or want of repair of any highway," &c.: *Dillon*, 2nd ed., sec. 786, note. And under this statute it has been held that it is the duty of municipalities concerned to remove obstructions made by others: *Johnson v. Town of Haverhill*, 35 N. H. 74; *Hall v. Manchester*, 40 N. H. 410; *Clark v. Barrington*, 41 N. H. 44; *Howe v. Plainfield*, 41 N. H. 135; *Palmer v. City of Portsmouth*, 43 N. H. 265; *Chamberlain v. Enfield*, 43 N. H. 356.

The Vermont statute is, in substance, that if any special damage shall happen "by means of the insufficiency or want of repair of any highway," &c.: *Dillon*, Mun. Cor., 2nd ed., sec. 786, note. And under this statute it has been held that it is the duty of the municipalities concerned to remove obstructions made by others: *Kelsey v. Town of Glover*, 15 Ver. 708; *Willaud v. The Town of Newbury*, 22 Ver. 458.

The obligation under all these statutes, under whatever form of words expressed, is substantially "to keep the highways in repair;" and this is the precise obligation under our statute cast upon municipalities in this Province.

I think that we cannot do better than follow the reasoning of the American Judges, in the several cases to which I have referred, and other similar cases to which I shall hereafter refer.

Any other course would, I fear, be destructive of the efficiency of our roads, and would be opposed to what I take to be the real intention of the Legislature, which is, to have the roads reasonably fit for travel.

The only case directly bearing on the point in this Province that I have seen is, the decision of the learned Judge

of the County Court of the County of Simcoe, in *Clark v. The Township of Oro*. The case is not reported, but the learned Judge has been good enough, at my request, to furnish me his written judgment for perusal. The obstruction there was, a skidway placed by a lumberman on one of the side roads of the township of Oro. It had been allowed to remain on the highway for months. The accident arose in consequence of the obstruction. The jury found a verdict for the plaintiff. And the learned Judge, in an able judgment, referring to, and adopting the principle of the American cases, sustained that verdict.

Having carefully read the judgment, I concur in many of the observations and in the ultimate ruling of the learned Judge. His long experience as a Judge and his knowledge of the wants, habits, and manners of the people of the country entitle anything which he says on such a subject as the present to great weight. He said, among other things, "I take it that a highway cannot be said to be in repair if there are obstructions on it so close to the travelled track as to render it unsafe passing by day or night, or even if the obstructions render the highway less commodious. And, I think, this would not be an unsafe rule in this country. The road, at all events, should be in such a condition as to be reasonably passable. It is to be remembered that a great part of the travelling on the back roads in this country is done in the night or early morning in teaming grain, drawing lumber, &c., and this more particularly in the winter season, when there is a track just the width of the sleigh and no more. If logs or other obstructions are so near the track as to catch the whipple-trees, which project beyond the sleigh, there is always danger. And such a road would not be safe, and consequently, I think, out of repair."

The two nearest decisions in any one of our Superior Courts that I have seen are, *Buchanan v. The Town of Galt*, 12 C. P. 73, and *Rowe v. Corporation of Leeds and Grenville*, 13 C. P. 515.

In the former case the plaintiff claimed damages from the defendants for a breach of duty in allowing and per-

mitting dirt and rubbish to be thrown upon a public highway on which his premises abutted, and which pressed against his fence. And it was held that the *mere* fact of a wrong doer throwing rubbish upon a public highway and thereby causing injury, such as complained of, to a private individual is not a breach of duty for which a municipal corporation is liable.

In the latter case, where defendants, a municipal corporation, for the purpose of repairing their road, placed on the side thereof heaps of gravel, &c., and took no precaution to prevent parties passing along the road from running against these heaps, it was held that a plea, under section 337 of Consol. Stat. U. C. ch. 54, that the action was not brought in three months, was bad, as the action was not based on the neglect of the defendants to keep the road in repair but on the commission of the act referred to, namely, placing gravel on the highway, and neglecting to afford sufficient notice or protection to the public against damage. It was, however, assumed that there was a good cause of action.

Neither case directly touches the point under consideration here.

In the latter case the defendants themselves were the authors of the wrong, and there can be no doubt as to their liability in such a case.

In the former case not only was the complaint entirely different to the complaint here, but the decision is rested on a principle that cannot be questioned: that is to say, that the *mere* fact of a wrong doer throwing rubbish upon a highway, coupled with injury, does not give a right of action against the municipal corporation.

The action is based on negligence. There cannot in such a case be negligence unless there be knowledge or means of knowledge. The mere existence on a highway of an obstruction is not enough to establish negligence on the part of the corporation: *McGinity v. The Mayor of New York*, 5 Duer 674. See also *Ray v. The Corporation of Petrolia*, 24 C.P. 73; *Hutton v. The Corporation of Windsor*, 34 U. C. R. 487.

It is necessary in some manner to connect the corporation with the obstruction, either as having directly caused it: *Hutson v. The Mayor of New York*, 9 N. Y. 163; *Rowe v. The Corporation of Leeds and Grenville*, 13 C. P. 515—assented to it; *The Mayor of New York v. Furze*, 3 Hill 612—or with a knowledge of its existence or the means of knowing of its existence, and being negligently ignorant of it, permitting it to remain: *Hart v. The City of Brooklyn*, 36 Barb. 226. See also *Bateman v. The City of Hamilton*, 33 U. C. R. 244; *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316; *White v. Hindley Local Board*, L. R. 10 Q. B. 219.

And where the obstruction is the work of a wrongdoer, notice of it should be brought home to the corporation, or the defect be so notorious, as to make it reasonable to fix the corporation with notice of it: *Dewey v. The City of Detroit*, 15 Mich. 307; *Mayor v. Sheffield*, 4 Wall. 189; *Hart v. The City of Brooklyn*, 36 Barb. 226; *Reed v. The Inhabitants of Northfield*, 13 Pick. 94; *Manchester v. The City of Hartford*, 30 Conn. 118; *McGinity v. The Mayor of New York*, 5 Duer. 674; *Davenport v. Ruckman*, 10 Bosw. 20, affirmed, 37 N. Y. 568. See also *The Mersey Docks and Harbour Co. v. Penhallow*, 7 H. & N. 329, affirmed L. R. 1 H. L. 93; *Hood v. The Harbour Commissioners of Toronto*, 33 U. C. R. 148.

If the defendants here had notice of the nuisance, or were negligently ignorant of it, they are liable to be sued. There was nothing latent about the poles. They were not only visible, but allowed to remain after an officer of the corporation had knowledge of their situation. So far as we can see, there was plenty of room for the placing of the poles without at all encroaching upon the travelled part of the road. The corporation might at all events have compelled their removal off the travelled part of the road, but did not do so.

It is for a jury to decide whether, under the facts proved, notice of a defect can or ought to be inferred. There is no presumption of law on the subject: *Colley v. The In-*

habitants of Westbrook, 2 Am. 30; *Stanton v. The City of Springfield*, 12 Allen 566; *Hall v. The City of Lowell*, 10 Cush. 260; *Mosey v. The City of Troy*, 61 Barb. 580.

If this question had on the evidence been submitted by the learned Judge to the jury, and they had found in favour of the affirmative, I would not have felt inclined to interfere with the verdict. And sitting as a juror I think I am warranted by the evidence in finding in the affirmative of the question.

In giving judgment in *Reed v. Inhabitants of Northfield*, 13 Pick. 94, Chief Justice Shaw said, p. 98: "It has often been held in giving a construction to this Act, that notice to the town of a defect of a highway may be inferred from its notoriety, and from its continuance for such a length of time as to lead to the presumption that the proper officers of the town did in fact know, or, with proper vigilance and care, might have known the fact. This latter is sufficient, because this degree of care and vigilance they are bound to exercise, and therefore, if in point of fact they do not know of such defect when by ordinary and due vigilance and care they would have known it, they must be responsible, as if they had actual notice." See further, *Dewey v. The City of Detroit*, 15 Mich. 307; *Manchester v. The City of Hartford*, 30 Conn. 118; *Hew v. Plainfield*, 41 N. H. 135; *Rapho and West Hempfield Townships v. Moore*, 8 Am. 202; *Weisenberg v. The City of Appleton*, 7 Am. 39, and cases in note thereto. This is the same doctrine as held in *The Mersey Docks and Harbour Co. v. Penhallow*, 7 H. & N. 329, S. C., L. R. 1 H. L. 93, to which I have already referred. See also *Thompson v. The North Eastern R. W. Co.*, 3 L. T. N. S. 618; *Submarine Telegraph Co v. Dickson*, 15 C. B. N. S. 759.

But it is argued by the counsel for the defendants that the negligence of the defendants was not the proximate cause of the plaintiff's injuries. Although Forsyth, the driver, swears that the cause of the accident was the shying of the horse, the plaintiff's evidence does not corroborate

him. I am not clear that the shying of the horse was the cause of the accident. But even if it were, I cannot on this point accede to the argument of the defendants' counsel.

In *Sherwood v. The Corporation of Hamilton*, 37 U. C. R. 410, I had occasion to consider the question of proximate cause in a similar case. The conclusion at which I arrived in that case, after an examination of many authorities bearing on the point, to which may now be added *Baldwin v. The Greenwoods Turnpike Co.*, 16 Am. 33, was that, although in one sense the shying of the horse may be said to be a cause of the accident, it is not the proximate cause—in other words, if the accident would not have happened but for the defect, although the shying of the horse may be a contributing cause, it is not such a contributing cause as to free the corporation from liability, where negligence is established. To that opinion I still adhere; and adhering to it must decide this point in favour of the plaintiff and against the defendants.

The remaining question is whether there was contributory negligence on the part of the driver.

The degree of care which should be reasonably looked for in one case would not be reasonably required in another. Care in each case can only be properly measured by the degree of danger to which the person is exposed. There is more danger in crossing a railway track than in driving along an ordinary highway. The track itself is a signal of danger, whereas on the highway there may be no signal whatever of danger. For this reason *Johnston v. The Northern R. W. Co.*, 34 U. C. R. 432, is inapplicable to a case like the present.

It is, however, the duty of every one travelling along a highway to use caution and prudence adapted to the circumstances in which he is placed. The driver knew that the telegraph poles were placed on and along the highway at short distances from each other. Having used proper care he passed many of them in perfect safety. And yet knowing of their existence he, all at once, ceases

to pay any attention whatever to the highway, and while in this careless state, he, in broad daylight, at eight o'clock in the morning, drove against a particular pole which caused the sulky to upset. Had he been using *any* care at the time the accident could not have occurred. If he were the plaintiff, a jury would be quite justified in finding him guilty of contributory negligence : See *Raymond v. Lowell*, 6 Cush. 536 ; and our decided cases shew that in such a case as the present the plaintiff is liable for the negligence of the driver: *Winckler v. Great Western R. W. Co.*, 18 C. P. 250 ; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 382 ; *Rastrick v. Great Western R. W. Co.*, *Ib.* 396. If I were sitting as a Judge with a jury, I should leave the issue to a jury : but sitting here as a juror, I am compelled to find this issue against the plaintiff.

MORRISON, J.—I am also of opinion that the defendants are entitled to our judgment. My judgment is solely rested on the ground of contributory negligence—the only point which I have considered.

WILSON, J., concurred.

Rule discharged,

IN THE MATTER OF THE ELECTION FOR THE ELECTORAL
DIVISION OF ADDINGTON—DAVID JAMES WAGGONER,
PETITIONER, AND SCHUYLER SHIBLEY, RESPONDENT.

Controverted election—Delay in trial—38 Vic. ch. 10, secs. 1, 2, D.

The 38 Vic. ch. 10, sec. 2, D., enacts "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem*, until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." The petition here was filed on the 12th December, 1874. Hilary and Easter terms, and the session of Parliament, took up three months and eleven days, so that, under the Act, the six months would not expire until the 21st September, 1875. The trial having been fixed for the 10th August, the respondent's attorney consented, without prejudice, to adjournment, and on the 30th July an order was made postponing the trial until a Judge should be able to attend. On the 22nd December, 1875, the trial was fixed for the 18th January, 1876, and afterwards by consent postponed till 2nd February. *Held*, that the trial need not be commenced within six months in order to authorize a postponement, but that the commencement may be postponed beyond that time.

The Glengarry election, 12 L. J. N. S. 117, not followed.

But, under the facts more fully stated below, it was held that the long delay was not warranted; and all further proceedings were stayed.

In Hilary Term, February 11, 1876, *Bethune* obtained a rule calling on the petitioner to shew cause why all further proceedings should not be stayed, on the ground that the trial was not commenced within six months from the time of the presentation of the petition, within the meaning of sec. 2 of the 38 Vic. ch. 10, D.; and on the ground that although a day was fixed for the trial within the six months, the trial was not postponed upon affidavits that the requirements of justice rendered it necessary that a postponement should take place; and on grounds disclosed in the affidavits and papers filed.

The facts were: The petition was filed on the 12th of December, 1874. Notice of trial, dated the 22nd of July, 1875, was served on the 27th for the trial, which was fixed for the 10th of August.

It was said Mr. Justice Morrison, who fixed the time and place of trial, suggested that the trial should be postponed,

as it was not likely a Judge could be found on the day named to try the cause.

On the 28th July the petitioner's attorneys telegraphed to the respondent's attorney asking him if he would consent to an adjournment of trial, or should an application be made on affidavit. The same day the respondent's attorney answered "will consent without prejudice to adjournment."

On the 30th of July Mr. Boomer, for the petitioner, and a clerk from the office of Bethune, Hoyles, & Ball, for the respondent, attended in chambers before Morrison, J., and by consent an order was to be made to postpone the trial until such time as a Judge should be disengaged so as to be able to try the petition. The order was made, but was not then to issue, for the learned Judge could not then fix a day for trial as he did not know what Judge would take the case.

On the 22nd of December the trial was fixed for the 18th of January, 1876. The trial was afterwards by order of the Chief Justice, with the consent of those representing the respective parties, postponed until the 2nd of February.

On the 21st of January the respondent made an affidavit that he would be unable to prepare for his defence if the trial was proceeded with on the 2nd of February.

On the 10th of January the petitioner gave and published a notice of his intention to apply to withdraw the petition, and on that ground his attorneys had the trial then fixed for the 18th of January postponed till the 2nd of February. A few days after the petitioner alleged that a scurrilous article appeared in one of the newspapers, which article was published in the interest of the respondent, attributing unworthy motives to the petitioner in presenting and afterwards abandoning his petition. And he then gave notice to his attorneys not to abandon but to proceed with the trial of the petition.

During this term, May 31, 1876, *Robinson, Q. C.*, shewed cause. The petition being filed on the 12th of December, 1874, and the session of Parliament having lasted from the 4th of February, 1875, till the

8th of April, the 12th of August, which was the day first fixed for the trial, was clearly within time. The trial need not be imperatively had within six months from the presentation of the petition, for the statute enables it to be postponed upon affidavit, if the requirements of justice shall render it necessary. An affidavit was made to procure the postponement, but that is not absolutely essential; it is a mere matter of practice, and may be dispensed with, or it may be altogether unnecessary. If something took place in presence of the Judge at the trial which made a postponement necessary, it cannot be said that such a matter must be stated on affidavit when the Judge has seen it and is already fully informed of it. Then the enlargement was made by express consent of the parties, and at the instance and suggestion of the learned Judge who had fixed the day of trial, and for a cause, viz., the want of a Judge to take the trial during the vacation, which certainly was a requirement of justice which rendered it necessary that a postponement should take place. The period of six months must be computed exclusively of the time of the session of Parliament, and these six months may be extended upon application for that purpose if the requirements of justice render it necessary. That is not altogether disputed by the respondent. His counsel admits that a postponement beyond the six months may be allowed, but he says that can only be done after the trial has commenced and during the progress of the trial. The words of the statute are: "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem* until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." To construe it as contended for by the other side would make it obligatory on the Judge, at a great and useless expense to all concerned, to proceed to the place of trial, and go through the form of commencing the trial, for the mere purpose of postponing it, which might

far better in every way have been done by the Judge at his own chambers. The words "unless on application," &c. must therefore extend as well to a postponement of the trial before the trial has commenced, as to a postponement of it if it has begun. The word "postponement" shews that the enactment should be so read, because it more appropriately refers to a delay granted before the time of trial has arrived, while adjournment refers to delay given during the progress of the trial. The *Glengarry Case*, 12 L. J. N. S, 117, is the only one which contains any *dictum* opposed to such a construction.

Bethune, Q. C., supported the rule. The Court and Judge have no jurisdiction to try these election petitions except under the statutes. There is no discretion to be exercised as to the time of these trials unless the power to act according to discretion is expressly given by statute. The statute, instead of affording the least ground for the Court or Judge to extend and postpone from time to time such trials, has declared emphatically that the trial *shall* be commenced within six months from the presentation of the petition, and it has further declared that each trial *shall* be proceeded with *de die in diem* until the trial is over, unless—that is, the trial shall be proceeded with *de die in diem* until it is over, unless—on application the requirements of justice render it necessary that a postponement should be granted. The *commencement* of the trial is not to be postponed beyond the six months for any cause, unless it may be that the time the House is in session may be allowed to the petitioner, although that is not conceded. And it is clear that the Legislature intended these trials should be disposed of promptly and believed that six months was a long enough period to afford full time for the trial, and to provide also for any unforeseen events. The second proviso in the second section of that Act shews the intention of the Legislature in this respect, for it has declared that if the petitioner shall allow three months to elapse after the petition has been presented without getting the day of trial fixed, any elector may on application be substituted for the

petitioner on such terms as shall be just. There is no difference in the meaning of the words "postponement" and "adjournment." They both mean a period of delay.

June 29, 1876, WILSON, J.—I do not say that it is quite easy to determine what the intention of the Legislature was, whether it was that the time of the commencement of the trial might be postponed for just cause beyond the period of six month from the presentation of the petition, after making all allowances for the period of the sitting of the Parliament, as well as that the continuance of the trial after it had begun might be postponed, or whether it was that the postponement should be given in the latter case only. There are strong arguments in favour of each construction.

There is the unquestionable anxiety and determination to avoid delay, and to remedy the injustice there was under the previous statutes of the petitioner keeping the cause hanging over the respondent for an unlimited time on the one side. And there is the inconvenience and useless expense of beginning a trial formally within the six months when there is no intention to proceed with it for the mere purpose of granting a postponement of it which might with advantage to every one have been better granted without that cost and trouble on the other side.

The term *postponement* has certainly a more correct meaning when applied to the delaying of a trial which has not commenced, than to the delaying of it after it has commenced. "He postpones his visit until the commencement of a new year. * * * A merchant postpones the shipment until after the arrival of the expected fleet": *Crabb's Synonyms*, tit. "Postpone," &c. While *adjourn* signifies only to put off for a day or some short period. An adjournment is no more than a continuance of the session from one day to another": *Ibid.* tit. "Adjourn" 1 *Bl. Com.* 186.

In *Worcester's Dictionary* it is said, tit. "Adjourn" "Congress, or Legislature, or Court, &c., is adjourned, Par-

liament is prorogued, a matter of business is postponed or deferred," and an adjournment is spoken of as a postponement.

I cannot place very great reliance upon the one term being used, and not the other. It may be noted also that it is not the *trial* which is to be postponed, but the *case*.

The fact that if the day of trial is not fixed within three months from the presentation of the petition another petitioner may be substituted for the one who is supposed to be in default, shews the pressure which has been put upon the petitioner to ensure all due expedition.

In the face of these arguments we must look at the language which has been used. It is that "subject to the provisions of the next preceding section, the trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with *de die in diem* until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place."

The trial it is said, "shall be commenced within six months and shall be proceeded with," &c. That is just the same as if it were said, and the *trial* shall be proceeded with, &c.

The enactment is in effect so expressed, for the words *the trial* or the word *it* must necessarily be understood.

If the words had been "And the trial shall be commenced within six months and be (instead of *shall* be) proceeded with," &c., the subsequent provision "unless on application," &c., might more easily have been held to over-ride the whole enactment, but the repetition of the auxiliary verb *shall* in the second sentence has given that sentence a new force and an independent effect and operation which has caused the difficulty I have felt in forming an opinion upon it. That part of the section arranged properly would stand as follows:—The trial shall be commenced within six months and shall be proceeded with *de die in diem* until the trial is over, unless on application, &c., a postponement of the

case should take place. And in my opinion the enactment can be read so as to make the condition cover the two branches of the legal action, and not the latter one of them only. That there is great difficulty in the construction of statutes may be seen in the case of *The Eastern Counties R.W. Co. v. Marriage*, 2 H. & N. 625; *S. C.* in the House of Lords, 6 H. & N. 931.

I confess I have changed my mind more than once upon this provision. It is more reasonable that the commencement of the trial should be postponed beyond the six months if it is necessary to do so, than that the trial should be formally begun for the mere purpose of then postponing it.

That being so, what then are the facts of the case? The petition was filed on the 12th of December, 1874, the six months would expire upon the 11th of June, 1875. There have then to be added to that day so many days of Hilary Term, 1875, which preceded the opening of the Parliament, that is three days; then the Parliament sat from the 4th February to the 8th of April, two months and five days; then Easter Term lasted from the 17th of May to the 5th of June, twenty days, and Trinity Term from the 23rd of August to the 4th of September, thirteen days, making in all say three calendar months and 11 days, which will extend the six months from the 11th of June to the 21st of September, 1875.

But this is now the month of June, 1876, or nearly nine months after the latest day for the commencement of the trial, and no trial has been begun yet. And no case has been made for the great delay between the 10th of August, when the trial was first fixed to take place, and the 2nd of February when it was last appointed to be held.

It cannot be said that the requirements of justice rendered it necessary there should have been any such delay, and particularly in the face of a statute which requires strict promptitude, and in defiance of the remedy which the Legislature has provided to suppress the mischief of these suspensory actions, which, while they last, keep the very

constitution of the House in which every one is interested in doubt and uncertainty.

From my reading of the statute I think it should, as to the taking down of the petition to trial, be construed as follows: 1. That the trial when the Court or a Judge does not consider the respondent's presence at the trial necessary may be commenced during a session of Parliament, and may be continued during the session of course.

2. When the respondent's presence is considered to be necessary, the trial shall not be commenced during a session of Parliament.

3. When the trial has been commenced before the session of Parliament begins, it may be proceeded with during the session, whether the respondent's presence be necessary or not necessary.

4. The trial shall neither be commenced nor proceeded with during any term of the Court of which the Judge trying it is a member and at which by law he is bound to sit.

5. The trial shall be commenced within six months, &c., and shall be proceeded with *de die in diem* until the trial is over, unless, &c.

6. In the computation of the six months any delay allowed for any step or proceeding in respect of the trial, or for the commencement of the trial, the time occupied by any session of Parliament shall not be reckoned.

7. The statute does not say that any part of the six months during which the trial is not to be commenced or proceeded with by reason of the Judge who is to try the petition being engaged in term, shall not be reckoned against the petitioner, but I am of opinion that period must also be excluded from the computation of the six months.

In the *Glengarry Case* I entertained and expressed a different opinion on the computation of the six months from the one which I have now formed, and formed as I have before said, after a good deal of doubt.

The rule should be made absolute, but as the respondent was a consenting party to the delay between the 10th of August and the 2nd of February, and was, but for the

alleged state of his health, willing to go to trial, it should be absolute, without costs.

Rule absolute.

IN THE MATTER OF THE CONTROVERTED ELECTION FOR THE
ELECTION OF A MEMBER FOR THE HOUSE OF COMMONS
FOR THE CITY OF KINGSTON : JOHN STEWART, PETI-
TIONER, AND SIR JOHN ALEXANDER MACDONALD,
K. C. B., RESPONDENT.

*Controverted Election—37 Vic. ch. 10, D.—36 Vic. ch. 28 D.—Petition
irregularly filed—Fixing day of trial.*

“The Dominion Controverted Elections Act, 1874,” 37 Vic., ch. 10, repealed “The Controverted Elections Act, 1873,” 36 Vic. ch. 28, under which the Election Court existed, except as respected elections held before the passing of the first-mentioned Act, and directed all elections in future to be tried in this Court.

The petitioner, on the 6th of February, 1875, filed his petition under the last Act, but entitled “In the Election Court,” the notice of filing and of the deposit and other papers being entitled in the same Court, and delivered it to the Clerk of the Crown, who was the clerk both of the Election Court and of this Court. Afterwards, on the 28th of August, an order was made setting aside the notice of trial given entitled in this Court, on the ground that no petition was filed in this Court, and by a rule of the Election Court the petition was taken off the files of that Court, on the ground that the Court had no jurisdiction to try a petition under the Act of 1874. The petitioner then, on 20th November, 1876, applied to this Court to fix a day for the trial, which was refused, for 1. There was no petition in this Court; and 2. If it had been at first well filed, the trial was not commenced within six months from its presentation, and no application made within the time to postpone it.

In Michaelmas Term, November 20, 1876, the petitioner in person obtained a rule calling on the respondent to shew cause why a day and place for the trial of the election petition in this matter should not be appointed by this Court, upon grounds disclosed in the affidavit filed.

The affidavit of the petitioner, material to this application, stated as follows: That the petition in this matter was filed on the 6th day of February, 1875, and the deposit of \$1,000 was made in this Court, as the petitioner was

informed by his attorneys, Messrs. Britton and Price. That on the 22nd of July thereafter, application was made by the said attorneys to Mr. Justice Morrison, one of the Judges of this Court, to fix a day of trial of the petition; and that the 6th day of August then following, was named by the said Judge for the said trial; and the Clerk of the Crown and Pleas of this Court was instructed by the said Judge to mail the said notice of trial, which he did. That the sheriff of the county of Frontenac was thus instructed by this Court to have the Court-room at Kingston ready on the said 6th day of August for the said Court. That the trial of the petition was postponed in consequence of affidavits made in this Court that the respondent was not prepared for trial at so early a day, and that the requirements of justice rendered such postponement necessary. That no Judge had yet appeared in Kingston to try the petition. That a meeting of the subscribers to a fund for the prosecution of the petition, was called by the petitioner at his dwelling house in Kingston on the 24th of the said month of August, and at that meeting the attorneys of the petitioner stated to him and to the meeting that the respondent had made a proposal and had completed an agreement to get withdrawn the petitions against the member for West Toronto, Prince Edward county, and Kingston, in the Ontario House, if the petition against the respondent should be likewise withdrawn. That his attorneys urged upon the petitioner and upon the meeting the sanctioning for party purposes the said bargain of the respondent. That the petitioner then and there refused to sanction the bargain, and on the same day wrote to his attorneys reiterating his refusal and giving his reasons. That the petitioner has reason to believe, and does believe, and is confident, he can prove that this corrupt arrangement was initiated by the respondent as far back as the filing of the said petition. That the petitioner has reason to know that agents of the respondent were in Kingston negotiating the said corrupt arrangement. That in consequence of such negotiations the petitioners in the Kingston Ontario election case signed

a document to withdraw their petition, and that one or more of the said petitioners informed this petitioner they had signed such document in the belief, and in consequence of statements made to them, that this petitioner had signed or would sign a similar document in relation to the Kingston Dominion election. That the said corrupt arrangement to withdraw the said petitions is a matter of notoriety in Kingston and is well known in West Toronto. That the petitioner has a letter from his said attorneys, dated 24th of August, 1875, intimating their intention of not giving this petition proper support. That intimation of this letter was given to this Court by a letter to the clerk of the Crown and Pleas of this Court, dated the 25th of August, 1875. That intimation was given by the petitioner to Britton & Price that they were considered by him no longer his attorneys. That intimation to the same effect was given by the petitioner to Messrs. Walkem & Walkem, attorneys of the respondent. That intimation was also given by the petitioner to this Court by a letter to the clerk thereof; That, notwithstanding this, Britton & Price have acted as petitioner's attorneys. That the said latter action of Britton & Price has been to defeat the petitioner's petition, and thereby give effect to the said corrupt agreement of the respondent. That the delay which has occurred in the trial of the petition has not been caused by the petitioner; and that the petitioner is desirous the trial of the petition should be recommenced and continued, and that a day be appointed for that purpose.

The respondent filed affidavits and papers to the following effect:—That the petition filed against him was entitled "In the Election Court." That the notice of filing the same and of the deposit of the \$1000 is entitled "In the Election Court," and that the petitioner notified the respondent that it was on the 6th of February, 1875, "presented herein, and was this day left with the election clerk at Toronto," and that the \$1000 was deposited "with the clerk of the Election Court." That no election petition against the respondent had been filed in the Courts of Common Pleas or Chancery.

or in this Court. That an election petition was on or about the 7th of February, 1875, delivered to Robert G. Dalton who is clerk of the Election Court for the trial of election petitions under the Controverted Elections Act of 1873, That the respondent's election took place on or about the 29th day of December, 1874. The respondent declares as follows: "I have never made or entered into any contract, bargain, or agreement with the petitioner or with any other person or persons acting for him, or with any other person or persons whomsoever for the withdrawal or abandonment of the petition referred to in the said affidavits, and I deny the truth of all corrupt and improper practices alleged and charged against me in the said affidavits."

F. Osler, on behalf of the respondent, in his affidavit stated that a summons was issued on the 30th of July, 1875, by Morrison, J., requiring the petitioner to shew cause why the notice of trial given in this matter should not be set aside on several grounds, and among others on the ground that there was no election petition relating to the said election, filed in this Court; and that on the 28th day of August thereafter an order was duly made on the said summons by Mr. Justice Wilson setting aside the said notice of trial, on the ground that there was no election petition relating to the said election filed in this Court, and that the order had never been appealed against, and was still in full force and unreversed. And that by a rule of the Election Court the said petition was ordered to be taken off the files of that Court, on the ground that the said Court had no jurisdiction to try a petition under the Controverted Elections Act of 1874.

The notice of trial referred to was entitled "In the Queen's Bench," and was dated the 22nd day of July, 1875, and was signed "Robert G. Dalton, Clerk of the Queen's Bench."

In this term, May 23, 1876. *Osler* shewed cause. There is no petition on the files of this Court, and therefore this Court cannot fix a day and place for the trial of the petition referred to. That petition was delivered to

the clerk of the Election Court under the 36 Vic. ch. 28, D., and the 37 Vic. ch. 10, repealing that Act, has not wholly abolished the Election Court; that Court, by sec. 1 of the last-named Act, has still a continuance as respects elections held before the passing of this Act. The petition, therefore, when headed "In the Election Court," and delivered in to the officer of that Court, was not a wholly useless proceeding, although it had no actual operation because that Court had no jurisdiction over the cause. The Judge's order setting aside the notice of trial has in effect determined this matter already, because the order decided that there was no petition filed or any such proceeding pending in this Court. The form of the petition is given in the Election rules, 34 U. C. R. 272, No. 5, and shews it should be intituled in the proper Court. Then the trial of the petition, if it be one which was filed in this Court, was not "commenced within six months from the time when such petition has been presented," according to the 38 Vic. ch. 10 sec. 2, and it cannot therefore be proceeded with. The *Glengarry Case*, 12 L. J. N. S. 117, is a decision on this point against the petitioner.

The petitioner in person supported his rule. The fact that the petition was intituled in the Election Court is of no consequence. It is a merely formal objection, and no proceeding under it should be defeated by any formal objection: 34 U. C. R. 311, rule 66. Besides, the office of the Election Court under the Act of 1873 is the same office, and the officer in charge of it is the same officer as under the Act of 1874; the clerk of the Election Court and the clerk of the Queen's Bench is the same person. This Court adopted the petition as duly filed with its own proper officer by fixing the time and place of trial by one of the Judges of the Court, and by directing notice of trial to be given. The trial was then duly begun, and all that is asked is that it should be continued and a time and place fixed for the purpose. The

(a) See the *Addington Election*, ante p. 131.

delay was not caused by the petitioner, and the Court can direct the necessary proceeding now to be taken. The Act of 1875, sec. 2, does not apply here, because a day of trial was duly fixed within the period of six months after the presentation of the petition.

The petitioner also referred very fully to the alleged illegal and corrupt compromise of the election petition, but as it forms no part of the subject for adjudication by the Court, it is not further noticed.

June 29, 1876. WILSON, J.—If the petition had been delivered to the proper office of the Court to which it belonged, or for which it was intended, the want of an intituling in the Court, or a wrong intituling, would be an irregularity only, and therefore it would be a curable and not a void proceeding.

This petition was in fact filed in the Election Court, and that Court directed it in consequence to be taken off its files.

The Election Court and the Queen's Bench having had the one office and the one officer to receive and file petitions has in this case operated against the petitioner.

The only way by which it could be known in which Court the petition was presented and was to be filed, was by the direction the officer got, or by the mode in which the petition itself was intituled. If there had been no such Court in existence as the Election Court at the time, and the petition had been filed in the Queen's Bench, it would have been well filed, because the officer who received it filed it in the Queen's Bench, in which Court it was properly receivable and filed, and the wrong intituling of it in the Election Court, or in any other Court, or the omission of an intituling at all, would only have been an irregularity.

But if it had been filed in the Queen's Bench when it could only have been filed in another Court, say in the Common Pleas, the intituling and filing in the Queen's Bench, the wrong Court, would be a perfect nullity.

Now here the mistake is one of the latter kind. The intituling and filing are in the Election Court, while they

should have been in the Queen's Bench, and the fact that the same office and officer answer for each Court does not alter the matter in any way. It is just the same as if the offices were in different rooms and the duties of receiving and filing were transacted by different officers.

Since the Election Court removed the petition from their files, it has not been placed upon the files of any other Court, and it could not have been for it was then too late. I think this objection is, under the circumstances, a valid objection.

The other objection which was, taken was, that no time could be given to the petitioner for the trial of his cause, as the period of six months from the presentation of the petition had elapsed.

This objection assumes, for the purpose of argument, that the petition was well filed. I have already considered this part of the case in the *Addington Case* (a), and it is unnecessary to say more than that my opinion is that the time for the commencement of the trial may, by an application made before the six months have expired, be postponed upon the necessary case for that purpose being established; and that the postponement is not limited merely to the extension of time being given after the trial has begun; and that the petitioner is entitled to have excluded from the computation of the six months all such time as the Parliament is in session, and such time as the Judge who is to try the petition is engaged in the term business of his Court.

On that view of the law, how does the petitioner's case stand?

The petition was presented on the 6th of February, 1875—while the House had been in session for two days.

The House remained in session from the 4th of February till the 8th of April, or two months and three days. The first day of the six months began on the 9th of April. The six months would expire in the ordinary efflux of time on

(a) *Ante* p. 131.

the 8th of October. But to that day has to be added the 20 days of Easter term and the 13 days of Trinity term, or 33 days which may be called accurately enough for this purpose one month and three days, which will make the six months end upon the 10th of November, 1875.

This is now the month of June, 1876, and no trial has been commenced yet.

The present rule was not moved until the 20th of November, ten days after the expiration of the six months.

The petitioner claims to be entitled to relief because he has been endeavouring to procure a trial ever since July, 1875, and because he says he is not to blame for the delay.

There is no doubt he has been most anxiously pressing for a trial of his cause, but the difficulty in his way was that the petition was presented to and filed in the wrong Court, and he could not get rid of that objection. And for that he must, as between himself and the respondent, be held to be answerable.

In my opinion this Court has not the power to give a further day beyond the proper limits of the determined period of six months for the trial of the petition. If we were to do so, we would be exceeding our powers.

There are therefore two irremediable objections to the petitioner's application. Firstly, the petition was presented to and filed in the Election Court and that Court has removed the petition from their files, and it has never been presented to or filed in this Court; and secondly, assuming the petition to have been at first well filed, the trial was not commenced within six months from the time of its presentation, allowing all full extensions to that period as before stated, and no proper application was made within that time to postpone it.

We have no alternative but to discharge the rule, and on the whole we think the rule should be discharged, with costs.

MORRISON, J., concurred. HARRISON, J., was not present at the argument.

Rule discharged.

IN THE MATTER OF THE CONTROVERTED ELECTION PETITION
AS TO THE ELECTION OF A MEMBER FOR THE HOUSE OF
COMMONS FOR THE NORTH RIDING OF THE COUNTY OF
VICTORIA. — HECTOR CAMERON, PETITIONER; JAMES
MACLENNAN, RESPONDENT.

Election trial—Counsel fees—Taxation.

At the trial of an election petition, and on appeal from the judgment, the petitioner, a barrister, appeared in person, but was assisted by a junior counsel. On taxation, the petition having been dismissed, counsel fees were charged, to first counsel at the trial \$300, and to second counsel \$150; and on argument of the appeal, to first counsel \$150, second counsel \$100. The Master disallowed fees to the first counsel, but allowed \$200 to the second counsel at the trial, and the \$100 on appeal; there being no affidavit of payment or receipt for such fees, though it was called for and insisted upon for the respondent. On application for revision: *Held*, 1. That the fees should not, under the circumstances, have been allowed without proof of payment. 2. That no more than \$150 should have been taxed for the second counsel at the trial. A revision was therefore ordered, with an intimation that the \$150 and \$100 might be allowed on satisfactory proof of payment.

February 14, 1876. *J. S. Ewart*, for respondent, obtained, during Hilary term last, a rule calling on the petitioner to shew cause why the order made by Wilson, J., on 21st December, 1875, upon the summons for a revision of taxation of the costs herein, should not be set aside or varied, and the summons made absolute, on the following grounds:

1. Because the taxing officer should have disallowed the counsel fees which are charged in respect of the trial held at Lindsay, on the ground that the petitioner conducted his case in person, and that no counsel was employed by him, or appeared at such trial, and on the ground that no counsel could have appeared at such trial with the petitioner.

2. Because, if any portion of such fee is charged in respect of the services of Mr. Osler, when he appeared at the adjourned argument held in Toronto, the fee allowed by the taxing officer is excessive.

3. Because the fees allowed on the appeal should have been disallowed, as the petitioner conducted his case in appeal in person.

And also as to each point, on grounds disclosed in affidavits and papers filed.

The order of Mr. Justice Wilson was dated 21st December, 1875, and discharged the summons for revision without costs, but expressly reserved to the respondent liberty to apply to the full Court for a revision of taxation.

The affidavits on which the summons for revision was obtained stated that it was proved to the satisfaction of the Master that the time occupied by the trial of that portion of the petition to which the petitioner was entitled to costs, was a portion of two days at Lindsay, and the adjournment for the addresses of counsel at Toronto, which occupied the portion of another day.

In the bill rendered for taxation the charges in question were:—

For fee at the trial to first counsel, four days	\$300 00
“ “ “ “ second counsel.....	150 00

The master treated the two sums as one, and made a deduction of \$250, leaving the counsel fees at \$200.

The Master in effect disallowed the whole of the counsel fee for the first counsel, who was the petitioner in person, but thought, under the circumstances, that \$200 was little enough for the second counsel.

The second counsel at Lindsay was Mr. F. D. Moore, as the petitioner alleged.

The bill also contained the following items on the argument of the appeal:—1st counsel, \$150; 2nd counsel, \$100.

The Master disallowed the first item, but allowed the second, although the petitioner, as it was alleged, himself acted as the first counsel on the occasion of the appeal.

No affidavit of payment of the counsel fees to Mr. Moore and Mr. Osler, or either of them, or any receipt for their fees, was produced on behalf of the petitioner, although called for, and insisted upon by the respondent.

The respondent himself filed an affidavit to the effect that he conducted his defence in person: that he was present in Court during the whole time while the trial was being proceeded with, both at Lindsay and in Toronto: that the

trial was conducted on the part of the petitioner throughout all the proceedings at Lindsay, by the petitioner in person, who alone addressed the Court, and examined and cross-examined the witnesses on behalf of the petitioner, and that no other person than the petitioner took any part whatever in the proceedings at Lindsay, and that if Mr. Moore was present at all during the trial, the deponent believed it was but for a very small part of the time.

On the other hand the petitioner filed an affidavit to the effect that Mr. Moore was retained before the trial, consulted with him during the trial, and that he was assisted by him continually while the trial proceeded; but there was no statement that any fee had been paid to Mr. Moore.

Mr. Moore's affidavit was also filed. In it he swore that he was retained by the petitioner to act on the trial; that he attended the trial at Lindsay, and although the petitioner did the greater part of the work in connection with the trial, yet in pursuance of his retainer deponent was present and did attend as counsel during the greater part of the time the petition was being tried. He did not, however, state that any retaining or other fee had been paid to him.

There was also an affidavit to the effect that there were three days of the trial at Lindsay and one in Toronto, but that the Master, without giving any decision as to the exact time for which fees might be charged, held that as it was proved that Mr. Moore was retained and was present at the trial at Lindsay, and as it was a fact within the Master's own knowledge that Mr. Osler acted as counsel after the case came to Toronto, the Master, after having consulted with the taxing Masters of the other Courts, concluded to allow not a first counsel fee or a second counsel fee, but a counsel fee of \$200.

It also appeared that on the hearing of the appeal the petitioner confined his remarks to the question whether the appellant had lost his right of appeal, &c., but that Mr. Osler alone argued the case on the merits.

The Master, therefore, allowed the \$100 charged as having been paid to Mr. Osler.

Mr. Justice Wilson, after hearing argument on the summons for revision, said that the cases shewed very clearly that the client and his counsel could both be heard in a case: that the client, if a barrister, may elect to appear in person or as counsel, but appearing personally cannot be heard also by counsel, but that this was not a question of hearing but a question of allowance paid to counsel for his fee, or rather taxed to him for his fee, that he could not say he might not retain counsel to aid him and advise him at the trial, although the counsel may not be allowed to be heard, and that as the retainer was sworn to he, the learned Judge, would not interfere with the act of the Master.

So the summons was discharged without costs, with leave to respondent to appeal to the full Court, if he so desired.

During this term, May 31, 1876, *Beaty*, Q. C., shewed cause. He referred to *Smith et al. v. Graham*, 2 U. C. R. 268; *Henderson v. Comer*, 3 U. C. L. J. 29.

Ewart, contra, referred to R. G. 165; *Harrison's* C. L. P. Act, 2nd, 701; *Wilson v. Moulds*, 4 P. R. 101; *Shuttleworth v. Nicholson*, 1 Moo. & R. 254; *Newton v. Chaplin*, 10 C. B. 363, 366; *Parkinson v. Hanbury*, L. R. 2 H. L. 6; *New Brunswick and Canada R. W. Co. v. Conybeare*, 9 H. L. 719.

June 29, 1876. HARRISON, C. J.—The old rule was, that a fee paid to counsel was a mere honorarium. Of the old rule, I am sorry to admit, little if anything now remains except the shell.

It is only right, however, with Mr. Justice Bayley, in *Morris v. Hunt*, 1 Chit. 544, 550, to say, "It is never expected, it never has been the practice, and in many instances it would be wrong, that counsel should be gratuitously giving up their time and talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability, and certainly of great integrity, and with every qualification which is necessary to adorn the bar, to exert their talents.

It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a long attendance at the bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honourable reward of their labours."

The same learned Judge in the same case said, p. 550: "It is said that counsel can maintain no action for their fees: why? because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid *beforehand*, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honour and integrity of the bar that it is expected that all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect."

The relation of counsel and client in England renders the parties mutually incapable of making any contract of hiring and service concerning advocacy: *Kennedy v. Broun et ux.* 13 C. B. N. S. 677. And so a solicitor has no implied authority to pledge his client's credit to counsel by an express promise to pay counsel fees, so as to enable the counsel to sue the client for them: *Mostyn v. Mostyn*, L. R. 5 Ch. 457. The rule is different in Ireland in the case of an express contract: *Hobart v. Butler*, 9 Ir. C. L. R. 157. The rule in the United States will be found discussed in the note to the American Reprint of *Kennedy v. Broun*, 13 C. B. N. S. 742.

In this Province it was at an early period held that counsel can sustain actions for such fees to be paid to

themselves by their clients as are established by law : *Baldwin et al. v. Montgomery*, 1 U. C. R. 283. See further *Leslie v. Ball*, 22 U. C. R. 512.

Where the fees claimed are not such as come within the provisions of any statute or rule, the general principle in England—a principle which it is thought in England is for the advantage as well as the honour of the profession—should be maintained in force in this Province, and for reasons which apply here as well as in England : *Baldwin et al. v. Montgomery*, 1 U. C. R. 283.

It is now held that counsel fees may, at the instance of the client, be referred to the taxing officer for taxation like any other fees arising out of litigation : *Re C. K. & C. Solicitors, &c.*, 6 P. R. 226.

But the right of the party succeeding in litigation who has paid counsel fees to tax them against his opponent, has never been seriously doubted. In the case where it was questioned the right was affirmed, Best, C. J., saying : “ It stands upon as ancient an usage, and as sound a principle, as any other doctrine of the law of England, and certainly it never can be reasonably disputed by any man capable of thinking” : *Morris v. Hunt*, 1 Chit. 544, 555.

Where a brief has been delivered to counsel for the *bonâ fide* purpose of procuring his attendance at the trial, and his fee paid as it ought to be at the time of the delivery of the brief, the mere circumstance that he is, from no fault of his own, unable to be present at the trial, is no good reason for refusing to tax the fee paid to him in the event of the person paying him succeeding in the litigation : *Taylor v. Clarke*, 13 I. C. L. R. 571. See also *Henderson v. Comer*, 3 U. C. L. J. 29.

In this Province a practice has sprung up of taxing fees to counsel in every case without any proof of payment, and the consequence is, that although the fees are taxed and paid, they do not always reach the counsel who earned them. But it must for the honour of the profession be stated that this does not often happen.

The general rule is, that the successful party is only

entitled to tax such costs as he has *actually paid* at the time of taxation: *Lopez v. DeTastet*, 3 B. & B. 292; *Trent v. Harrison*, 2 D. & L. 941; *Freeman v. Rosher*, 6 D. & L. 517; *Barnes v. Attwood*, 5 C. B. 164; *Re S. an Attorney*, 14 C. P. 323.

This has long been the rule in regard to witnesses, and in this respect since Rule 165, *Harrison's* C. L. P. Act, 2nd ed., 701, payments to witnesses and counsel are apparently on the same footing.

This rule requires that affidavits of increase *must* set forth:—

1. The sums paid to counsel and for what service.
2. The names of witnesses, their places of abode, &c.

While the part of the affidavit as to the witnesses is usually carefully filled up, the part intended for the proof of payments to counsel is usually left blank.

It is just as necessary, under the General Rule of Practice No. 165, that there should be proof of payment of the sums paid to counsel as to witnesses.

The objection was taken here that there was no proof of the payment of the counsel fees. The objection was, I think, under the circumstances, a good one, and one that ought, in the interest of the profession, to be more frequently made than it is: See *Wilson v. Moulds*, 4 P. R. 101.

The present loose practice of taxing counsel fees, whether paid or not, has, I suppose, arisen in a great measure from the fact that in many suits the counsel is either the attorney or the partner of the attorney in the suit; but this is not a case of that kind.

The gentlemen for whom fees were taxed in this case are not either the attorneys or the partners of the attorney for the petitioner. If properly retained they were paid their fees. If paid their fees, and the amounts are reasonable, they ought to be allowed on taxation. If not paid, they ought not to be taxed.

The reason of the old rule requiring payment with the delivery of the brief, was to prevent counsel having an undue interest in the result of litigation; in fact, if pos-

sible, to keep the profession of an advocate far above and beyond that of any ordinary trade or calling, the principal aim of which is merely to make money.

The long established usage of the profession is to employ counsel, not upon a preliminary traffic for his services in consideration of future payment, but upon a preliminary payment of his fees before those services are obtained : Per Pigot, C. B., in *Hobart v. Butler*, 9 Ir. C. L. R. 166.

Where success in the particular case is the object, and the payment of counsel is made in any manner directly to depend on success, there is a strong temptation to use means which ought not to be used, and to argue that the end justifies the means.

Where vast responsibility rests, it is of the utmost importance that integrity should be guaranteed by all possible securities : *Kennedy v. Broun*, 13 C. B. N. S. 742, note.

The remarks of Erle, C. J., in *Kennedy v. Broun*, 13 C. B. N. S. 667, on this head are worthy of being treasured in the breast of every man whose hope or calling it is to serve his fellow-men in the ancient and honourable profession of the law.

He said, p. 737 : " We are aware, that in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty."

There is no good reason, in a case like the present, for disregarding the requirement of the rule that the affidavit of increase must shew not merely the amounts paid to witnesses, but the amounts paid to counsel ; and there are good reasons, some of which I have noticed, for regarding it.

The Master in taxing costs in a cause down to the *Nisi Prius* record is properly guided by the record and papers filed, but for the counsel fees, witness fees, and other similar

disbursements at the trial he should have some satisfactory evidence of payment, and that evidence in general the affidavit of disbursements required by the rule of Court.

The Master ought not in strictness to allow any item for which there is not before him some authority, admission, or evidence to justify the allowance, and after taxation should require all proper vouchers or affidavits produced for that purpose, except such as briefs for counsel, to be filed with the papers in the cause: *Wilson v. Moulds*, 4 P. R. 101.

Subject to the terms of any general rules of Court on the subject, or such as are involved in the decisions of the Court, the number of counsel to be allowed and the amount of their fees is in the almost uncontrolled discretion of the Master: *Grindall v. Godman*, 5 Dowl. P. C. 378; *Sharp v. Ashby*, 12 M. & W. 732; *Fazakerley v. Rogerson*, 1 L. M. & P. 747; *Lockstone v. The London, Brighton and South Coast R. W. Co.*, 12 C. B. N. S. 243; *Potter et al. v. Rankin*, L. R. 5 C. P. 518; *Frost v. The London, Brighton & South Coast R. W. Co.*, 21 L. T. N. S. 757; *Smith v. Baker*, 28 L. T. N. S. 669; *Wakefield et al. v. Brown*, L. R. 9 C. P. 410.

It is provided by R. G. 157, *Harrison's C. L. P. Act*, 2nd ed., 699 that fees shall in no case be taxed as between party and party to more than two counsel upon any trial or argument.

The ancient practice is, for the junior counsel to take notes, so that he may be present and engaged on the trial, and this may be although the presiding Judge know nothing of his presence: *Stewart v. Steele*, 4 M. & G. 669.

Counsel appearing in person may of course conduct the case or defence in all respects as if conducting for another, but are not entitled to tax counsel fees against the unsuccessful party: *Smith et al. v. Graham*, 2 U. C. R. 268. This, however was held not to extend to partners; *Henderson v. Comer*, 3 U. C. L. J. 29.

A party appearing in person, though not an advocate, must examine witnesses as well as address the jury: *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. But counsel may be heard to assist him on legal objections, *Ib.*

He may not only conduct the case or defence, but be a witness on his own behalf: *Cobbett v. Hudson*, 1 E. & B. 11. See further, *Benedict v. Boulton*, 4 U. C. R. 96; *Cameron v. Forsyth*, Ib. 189; *Bank B. N. A. v. McElroy*, 2 Pugs. N. B. 462; *Follansbee v. Walker*, 13 Am. 671. His wife, however, cannot be allowed to manage the case for him at *Nisi Prius* and "engage in scenes inconsistent with the character of her sex": *Cobbett v. Hudson*, 15 Q. B. 988.

Where counsel has been heard the party cannot be heard, or *vice versa*: *Newton v. Chaplin*, 10 C. B. 356, 366. There cannot be a mixture of the two characters: *New Brunswick and Canada R. W. Co. v. Conybeare*, 9 H. L. 711, 719; *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 6.

Where the senior counsel is himself the plaintiff or defendant, I see no ground for holding that he shall be deprived of the services of a junior where the services of a junior are necessary, or that in the case of an appeal, where he confines his attention to some preliminary objections, and the general merits are argued by a junior, the fee to the junior paid should not be allowed.

But in such case it is not, I think, competent to the Master to increase the fee to the junior either at the trial or the appeal beyond what was paid or supposed to have been paid: *Fay v. Murphy*, 1 Ir. Jur. O. S. 32; or, in such a case as the present, to treat the case as if there were only one counsel, and, in consequence, tax to the junior more than otherwise he would be entitled to receive.

I do not think that the amount allowed by the Master for second counsel on the hearing of the appeal in this case is at all excessive.

Upon the whole, it appears to me that the Master erred:—

1. In taxing the fees to counsel without proof of payment, as against the objection raised at the time.
2. In taxing more for counsel fees than \$150, the amount charged for junior counsel at the trial.

I see no objection, under the circumstances, to the Master now allowing the \$150 to junior counsel at the trial and \$100 to junior counsel on the appeal, on production of an affidavit or affidavits, or other satisfactory evidence of payment.

The rule will be absolute, without costs, to rescind the order of Mr. Justice Wilson, and to make absolute the summons for revision of taxation on the points which I have mentioned.

MORRISON, J., and WILSON, J., concurred.

Rule accordingly.

MASON, Assignee of WM. LOTTRIDGE, an Insolvent, v.
REDPATH AND DRUMMOND.

Sale of goods—Insolvency of vendee—Acceptance—Right to rescind contract—Stoppage in transitu.

R. & Co., sugar refiners at Montreal, in September sold 145 barrels of sugar to L. at Hamilton, on 60 days credit. On the 27th November L. wrote to R. that he was unable to meet his acceptances, and on the 28th R. telegraphed to L. to know if he had received the sugar, and was answered that part had been received on the day before. Twenty barrels were received at L.'s warehouse on the 27th, and forty on the 28th, from the R. W. Co. On the 30th, Monday, R.'s agent called on L. and asked him to transfer the sugar to S. & Co., of Hamilton, and one load was sent to them, when L. forbade the sending more, but about an hour afterwards he ordered the rest to be delivered, and fifty nine barrels were sent, one barrel having been sold to a customer of L. On the 30th an agreement, prepared by L.'s solicitor, was signed by R.'s agent, reciting that the 59 barrels had been delivered to L., which R. wished to resell to others; and that it had been agreed, to avoid any question as to L.'s right to deliver to R. said 59 barrels, the others having been stopped in transitu, that R. should indemnify L. and his assignee, if any appointed, against all consequences of such delivery, in case a return thereof should be adjudged; and the agreement was to indemnify L. accordingly, and make good to him or his assignee the value of said sugar so to be delivered, if a return should be adjudged by a competent Court. L. made an assignment on the 5th of December, 1874, and on the 3rd February, 1875, the plaintiff, the assignee, conveyed to Lamb & Co. all the estate.

L., being examined, swore that he had no intention of receiving the sugar into stock: that it was sent to his warehouse by the R. W. Co. without his knowledge or instructions: that he had previously instructed his manager not to receive any goods: that when he became aware that it had been sent he ordered it not to be taken into stock; and that the agreement signed was an afterthought, subsequent to his agreement with R.'s agent to take away the sugar, and after part of it had been removed. This was substantially corroborated by the agent. In an action by the assignee of L. against R., claiming to avoid the giving up of the sugar as an unjust preference, and in trover:

Held, that the plaintiff could not recover: that whether there was strictly speaking a right of stoppage in transitu or not, the evidence warranted

a finding that before the assignment in insolvency the contract of sale had been rescinded by both parties, which it was competent for them to do. the goods not having been actually accepted; and the goods therefore never passed to the plaintiff.

Semble, that the count as upon a fraudulent preference could not have been sustained; and *quære*, as to the plaintiff's right to recover, he having before action assigned the property to Lamb & Co.

THE first count of the declaration alleged that the insolvent did within thirty days next before the date of the assignment in insolvency to the plaintiff, in contemplation of insolvency, give to the defendants by way of payment certain goods and chattels, that is to say, fifty-nine barrels yellow refined sugar, whereby the defendants obtained an unjust preference; and that the plaintiff elected to avoid the alleged payment, &c.

The second count alleged that the defendants, before Lottridge became insolvent, converted to their own use fifty-nine barrels of refined sugar, alleging them to be the property of Lottridge.

The third count was for conversion of the same fifty-nine barrels of refined sugar after the insolvency of Lottridge, and alleging the property to be the property of the plaintiff.

The remaining counts were for money payable by the defendants to the plaintiff for goods bargained and sold, &c., by Lottridge to the defendants, and for goods bargained and sold, &c., by the plaintiff to the defendants.

Pleas to the first count:—

1. Traverse of the appointment of plaintiff as assignee of Lottridge.

2. Traverse of the preference alleged.

3. Traverse of plaintiff's election to avoid the payment.

The defendants also pleaded to the first and second counts a traverse of the goods being the property of Lottridge.

There was also pleaded to the third count a traverse of the goods being the property of the plaintiff.

There was the plea of not guilty to the first and third counts, and never indebted to the fourth and fifth counts of the declaration.

Issue.

The action was commenced on 17th March, 1875. The issues came on for trial at the last Fall Assizes for the county of York, before Morrison, J., without a jury.

The defendants, sugar refiners, of Montreal, doing business under the name of John Redpath & Son, had, shortly before the insolvency of Lottridge, who was doing business under the name of W. M. Lottridge & Co., sold to him a number of barrels of refined sugar on credit. Twenty barrels were received at Lottridge's warehouse, in Hamilton, on 27th November, 1874, and forty barrels on 28th November, 1874.

The barrels, which were invoiced on 21st November, 1874, were a portion of a larger quantity purchased by Lottridge from the defendants in September, 1874, at the usual credit of sixty days.

A draft in respect of a previous transaction, amounting to \$1,991.77, fell due on 26th November, 1874, and was protested for non-payment.

Another draft in respect of a previous transaction, amounting to \$567.31, fell due on 27th November, 1874, and was also protested for non-payment.

On 27th November, 1874, Lottridge wrote defendants regretting his inability to retire the acceptances, and stating that remittances had so fallen off lately that his arrangements had been temporarily interrupted.

On 28th November, 1874, defendants telegraphed Lottridge to know if he had received the sugar invoiced on 21st November, 1874, and were answered that part had been received on the day before.

On Monday, 30th November, 1874, Mr. Houghton, acting for the defendants, called on Lottridge and desired to have the sugar transferred to Simpson, Stuart & Co., of Hamilton. Mr. Little, who was in the employment of Lottridge, procured a team and sent one load to Simpson, Stuart & Co., when the insolvent for the time forbid the sending of any more, but an hour afterwards told Little to deliver the remainder.

The quantity delivered to Simpson, Stuart & Co. was fifty-nine barrels. The reason that the sixty barrels were not delivered was, that one of them had been sold to a customer of Lottridge.

The fifty-nine barrels were delivered on 27th and 28th November, 1874, to Lottridge by the Great Western R. W. Co. in the ordinary way, and rolled into Lottridge's warehouse. They were placed by themselves in the warehouse alongside of other sugar belonging to Lottridge.

It appeared that on Monday, 30th November, 1874, Lottridge, although in hope of getting out of his difficulties, did not like to allow the sugar to be transferred to Simpson, Stuart & Co. without having an agreement of some kind to protect himself as against any demand of creditors.

The following agreement, prepared by Lottridge's solicitor, was thereupon signed by Mr. Houghton, acting for the defendants :—

“ HAMILTON, 30th November, 1874.

“ To Messrs. W. M. LOTTRIDGE & Co., Hamilton.

“ DEAR SIRs,—Whereas a lot of about fifty-nine barrels of yellow refined sugar have been delivered to you by our firm, being part of your order for one hundred and forty-five barrels of the same kind of sugar, on 27th and 28th instant, which we wish to re-sell to other parties.

“ And whereas it has been agreed between us, that to avoid any doubts or question as to your right to deliver us said fifty-nine barrels of sugar, the others having been stopped in transitu, we shall indemnify you against all the consequences of such delivery, and also save harmless your assignee, if any appointed, and make good to him or you the loss of said fifty-nine barrels of sugar in case a return thereof shall be adjudged upon the facts being submitted to any Court of competent jurisdiction.

“ Now these presents witness, that Messrs. John Redpath & Son, our executors, administrators, and assigns, shall and will indemnify and save harmless you, the said W. M. Lottridge & Co., of and against all the consequences of the delivery to us of said fifty-nine barrels of sugar, and make good and reimburse to you and your assignee, if any appointed, the value of the said sugars so to be delivered, in case a return thereof shall be adjudged upon the facts being

submitted to any Court of competent jurisdiction ; and we further agree, in case we are required by any assignee to be appointed to the estate of W. M. Lottridge & Co., to submit the facts to some Court of competent jurisdiction in Upper Canada, and have the same there tried, costs to abide the event.

“In witness whereof the said Messrs. John Redpath & Son have hereunto set their hand and seals.

“Signed, sealed and delivered

“JOHN REDPATH & SON.” (Seal.)

Per A. H.

Lottridge made an assignment for the benefit of creditors on 5th December, 1874.

The amount claimed by the plaintiff was \$1,269.45 and interest from 30th November, 1874.

This, including some admissions not necessary to be mentioned, closed the case for the plaintiff.

Defendant then put in a deed dated 3rd February, 1875, from the plaintiff to John Lamb and William H. Cross of “all the entire estate, stock-in-trade, book-debts, bills of exchange, promissory notes, and effects of the said insolvent (Lottridge) of any nature or kind soever,” for the expressed consideration of \$50,000.

Defendant also put in the examination of the insolvent, taken under a commission at Cleveland on 10th June, 1875.

In it he swore that on 30th November, 1874, he became aware of his inability to meet his obligations generally, and on the following day sent notices to his creditors announcing his suspension of payment, and calling them together for the further direction of his affairs, which meeting was called for 17th December, 1874.

He swore that when the sugar came to hand he had no intention of receiving it into stock until he should be satisfied that there would be no permanent interruption to business: that he never had any intention to receive it into stock when it arrived, and that he had no intention of receiving any goods from any one from 26th November, 1874, until such time as he should become satisfied that he was able to continue his business without interruption :

that he did not send to the railway company for the sugar : that there was no order or instruction of any kind given by him or through any one of his employees on his behalf, to that effect : that the 59 barrels were sent to the warehouse by the railway company, according to their usual practice, without any advice to him : that he had previously instructed his manager not to receive any goods : that as soon as he became aware that a portion of the sugar was at the warehouse, he at once declined to receive it, meaning thereby that it remained subject to the order of the consignors or of the railway company : that he ordered the sugar should not be taken into stock, and ordered the railway company to send no more, as it would not be received : that he had no intention of receiving any of it : that the document in writing, dated 30th November, 1874, was given in order that he might justify his action before his creditors should any question arise in the premises : that the instrument was an afterthought and subsequent to his agreement with Houghton, the defendants' agent, to take away the sugar, and that when it was executed part of the sugar had been removed by Houghton.

Mr. *Houghton* was called as a witness for the defence. He swore that as early as 9 o'clock on the morning of Monday, 30th November, he saw the insolvent, demanded the sugar on behalf of defendants, and was told to take it : that witness afterwards sold the lot to Simpson, Stuart, & Co. : that afterwards the insolvent required a paper to guard against any legal difficulty that might arise, when witness consented to execute the writing of 30th November, 1874 : that the sugar was not received by witness as a preference, or as payment, but as and being the property of the defendants : that the insolvent in no manner questioned the right of defendants to the sugar, but on the contrary said he did not mean to receive it.

This closed the testimony for the defence.

Counsel for the defendants objected to the plaintiff's right to recover, referring to several cases shewing that it is a question of intention as between the parties, and con-

tended that under any circumstances the sale and assignment from the plaintiff to Lamb & Cross, precluded the plaintiff from having any right of action against defendants in respect of the property.

Counsel for the plaintiff contended that the property became part of the insolvent estate, and the evidence clearly shewed the *transitus* at an end, and defendants could not regain possession of the sugar.

The learned Judge found in favour of the defendants. He did so, he said, because the evidence shewed that the sugar in question, after the insolvent was aware that he could not meet his liabilities, was taken by the teams of the railway company to the warehouse of the insolvent, without instructions from or the knowledge of the insolvent: that at the time of such delivery the insolvent did not intend receiving the sugar into stock, and had instructed his manager to that effect: that on 30th November, 1874, he was made aware that the sugar was at his warehouse, and declined to receive it according to his intention; and that it remained there for the consignors or the railway company: that on that day the defendants' agent demanded the sugar, and the insolvent assented to his taking it: that he did take it: that on the same day the insolvent suspended payment, and the following day called a meeting of his creditors. The learned Judge found that so far as it lay in the insolvent he did not receive the goods with a view of taking possession of them, and that the taking of possession by defendants' agent was not done by either party as an undue preference.

During Michaelmas term, November 26, 1875, *Snelling* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for \$1339.39, pursuant to leave reserved at the trial, the said verdict being contrary to law and evidence.

During this term, May 20, 1876, *Kerr*, Q. C., shewed cause. The special count cannot be maintained, because

no fraudulent preference or payment was shewn, and there can be no recovery in respect of the property, as that before action had been transferred by the assignee to Messrs. Lamb & Cross. Supposing the plaintiff to have a right to sue, Lottridge had a right to rescind the contract when he allowed the plaintiff to take possession of the sugar, and whether or not defendants were justified in taking possession when they did. In point of fact, the contract had been rescinded between the parties before the deed of assignment to the plaintiff: *Atkin v. Barwick*, 1 Str. 165; *Dixon v. Balduen*, 5 East 175; *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; *James v. Griffin*, 1 M. & W. 20, 29, S. C. 2 M. & W. 623; *Van Casteel v. Booker*, 2 Ex. 691; *Nicholson v. Bower*, 1 E. & E. 172; *Heinekey v. Earle*, 8 E. & B. 410; *Robson on Bankruptcy*, 2nd ed., 350; *Re Foot*, 11 Nat. Bank Reports, 153; *Campbell v. Barrie*, 31 U. C. R. 279; *Morgan v. Bain*, L. R. 10 C. P. 15; *Bingham v. Mulholland*, 25 C. P. 210; *Houston on Stoppage in Transitu*, 44, 124; Insolvent Act, of 1869, secs. 41, 42.

C. Robinson, Q. C., with him *Snelling*. There was no right of stoppage *in transitu*: *Ellis v. Hunt*, 3 T. R. 464, 468; *Heinekey v. Earle et al.*, 8 E. & B. 429, *note*; *Chitty on Contracts*, 10th ed., 395; 2 *Kent Comm.*, 11th ed., 544, 545; *Browne on Carriers*, 227, 233; *Houston on Stoppage in transitu*, 49; *Morley v. Hay*, 3 M. & R. 396; *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431; *Lewis v. Mason*, 36 U. C. R. 590; *Ascher v. Grand Trunk R. W. Co.*, *ib.* 609; *Hilliard on Sales*, 3rd ed., 294, 298; *Schotsmans v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 Eq. 349; S. C., L. R. 2 Ch. 332; *Ex parte Chalmers*, *Re Edwards*, L. R. 8 Ch. 289; *Ex parte Gibbes*; *Re Whitworth*, L. R. 1 Ch. D. 101.

June 29, 1876. HARRISON. C. J.—The Act which was in force when Lottridge assigned his property for the benefit of his creditors, was the Insolvent Act of 1869.

The effect of the assignment, under section 10 of that Act, was, to convey “books of account of the insolvent, all

vouchers, accounts, letters, and other papers and documents relating to his business, all moneys and negotiable papers, stocks, bonds, and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, movable and immovable property, debts, assets, and effects which he may become entitled to at any time before his discharge effected under this Act," with certain exemptions not necessary to be noticed.

An assignment in insolvency passes the property of the insolvent subject to any equitable rights or liens which others may have upon the same: *Re Coleman*, 36 U. C. R. 559.

In *Lewis et al. v. Mason*, 36 U. C. R. 590, 604, the late Chief Justice of this Court said: "I must confess it seems to me more equitable, where a person in failing circumstances has goods sent to him, in case of his making an assignment when the property has not actually come into his possession, that the unpaid vendor should be allowed to retain the goods until he is paid for them, rather than that they should be applied to pay the general debts that were contracted long before the sale of the goods intended to be returned. It was at one time a rule of the Scotch law that when a purchaser became insolvent within a limited time after goods had reached their destination the seller might retake the goods; a failure so soon after the purchase, apparently whilst the purchaser was insolvent, being considered as evidence of fraud and justifying the seller in retaking the goods."

But by the law of England when once the goods have actually reached their destination and been actually received by the vendee as his own, the right of stoppage *in transitu* is gone: *Bolton v. The Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431, 438; *Schotsmans v. The Lancashire and Yorkshire R. W. Co.*, L. R. 1 Eq. 349, reversed L. R. 2 Ch. 332; *Ex parte Gibbes, Re Whitworth*, L. R. 1 Ch. D. 101.

It is not necessary, in the view which I take of this case, to decide whether at the time of the delivery of the

goods to the agents of the vendors, there was strictly speaking the right of stoppage *in transitu*.

The vendee did not execute the assignment in insolvency till 5th December, 1874. If before that time he had the power to rescind the contract of sale, and in good faith, with the assent of the vendors, exercised that power, the goods, the subject of the sale, did not pass to the plaintiff.

No one can doubt the justice of the defence in this case. No one can doubt the perfect honesty of both parties at the time of the alleged rescission of the contract. The vendee when he found himself embarrassed and unable to pay for the goods, like an honest man, refused to receive them. The delivery by the railway company of the goods at his warehouse, although, in the ordinary course of business cannot, under the circumstances, amount to an acceptance of the goods by the vendee. Nor can the unauthorized sale by his manager or clerk of one out of the sixty barrels of sugar, under the circumstances, have that effect. The agreement of indemnity, executed as it was for greater caution, does not alter the leading facts of the case. The insolvent swears that he never intended on or after 26th November, 1874, to receive the goods, and so refused to accept them, notwithstanding the delivery at his warehouse. The learned Judge who tried the cause believed this testimony, and believing it found a verdict for the defendants. The finding is certainly sustained by the evidence, and the evidence shews not only the determination of the vendee to refuse to accept, but the return of the goods to the agent of the vendors on the 30th November, 1874; and so, if the parties at the time were competent to contract, the contract was on that day rescinded.

In *Atkin v. Barwick*, 1 Str. 165, the vendee finding his circumstances becoming embarrassed received goods from the vendor, and not thinking it reasonable that they should go to satisfy his other creditors sent them to a third person with instructions to forward them to the vendor; and this transaction was sustained as against the claim of the assignee in bankruptcy of the vendee to the goods.

In *Harman v. Fishar*, Cowp. 117-125, where Lord Mansfield is said first to have started the doctrine of fraudulent preference, his Lordship observed with respect to *Atkin v. Barwick*, 1 Str. 165; that the judgment seemed to be right, but the reasons wrong, and that *the true ground of the decision was, that the trader very honestly refused to accept the goods and returned them.* This reason given by Lord Mansfield was afterwards approved by Lord Kenyon, in *Neate v. Ball*, 2 East 117, 124.

In *Salte et al. v. Field*, 5 T. R. 211, it was held that the property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they were attached by the vendee's creditors, revests in the vendor so as to avoid the attachment, by the vendee's having countermanded the purchase by letter to his agent dated before the delivery, although not received till after the bankruptcy of the vendee.

Ashurst, J., in delivering judgment, said, p. 214: "And though the goods remained in the hands of the defendants, they did not remain there for the purpose for which they were originally intended: but, the contract being rescinded, the property revested in the plaintiffs." See also *Mills et al. v. Ball*, 2 B. & P. 457.

In *Smith et al v. Field*, 5 T. R. 402, where it was shewn that the vendor attached the goods as being the property of the vendee, notwithstanding the offer of the vendee to rescind the contract of sale, it was held that the vendor had precluded himself from setting up a rescission of the contract.

The true difference between this and the former case is, that in the former both parties agreed to renounce the contract, whereas in the latter case the vendor refused to do so. See per Grose, J., at p. 405.

In *Barnes v. Freeland*, 6 T. R. 80, it was held that if the vendee actually receive the goods intending to make them his own, he cannot afterwards rescind the contract so as to defeat the claim of the general body of his creditors.

In *Neate v. Ball*, 2 East 117, where the vendee, instead of at once refusing to accept the goods, kept them in his warehouse for several days, it was held too late for him afterwards to attempt to rescind the contract.

In *Dixon v. Baldwin*, 5 East 175, the vendees after having called a meeting of their creditors, and after having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, afterwards in good faith agreed to give up the goods to the vendor, and the transaction was sustained.

In *Bartram v. Farebrother*, 4 Bing. 579, where the consignee, on the arrival of goods at a wharfinger's, repudiated the contract, stating that he would not receive them, and directed an attorney to take the necessary steps to stop the delivery, which the attorney did, it was held that the contract of sale was rescinded.

In *James v. Griffin*, 1 M. & W. 29, affirmed, 2 M. & W. 623, where goods were received under the directions of the vendee by his wharfinger, the vendee at the time stating that he would not have them himself, the possession was held to be the possession only of the vendor, and the directions of the vendee held admissible evidence, although not communicated either to the vendor or to the wharfinger.

In *Heinekey v. Earle*, 8 E. & B. 410, where on the ship's arrival the vendee was embarrassed, and gave directions that the goods should not be received till further orders; but, notwithstanding, the goods were delivered at his premises in his absence and put by his servants into his warehouse, and next day the vendee wrote to the plaintiffs, stating the circumstances connected with the goods and his own position, and that his object was, to have the goods warehoused for them, but that his solicitor objected, and ended by expressing his regret that he was under the necessity of depriving the plaintiffs of what he considered their right, there was held to be no rescission of the contract.

In *Nicholson v. Bower*, 1 E. & E. 172, where on the arrival of the goods subject to the inspection of the vendee, the vendee inspected the goods, but said, "Do not work at present," meaning, according to Erle, J., "I shall hold my hands in respect of this transaction; because, unless I succeed in making arrangements with my creditors, this corn

ought to go back to the consignor," there was held to be no acceptance of the goods so as to entitle his assignee in bankruptcy to possession.

The cases, although varying in their facts, shew in principle that whether the vendee has accepted goods or not as and for himself, is a question of fact, and that if on the facts there cannot be said to be an actual acceptance of the goods by the vendee as and for himself, and there be the vendor's assent to the refusal to accept, the goods do not pass under a subsequent commission in bankruptcy.

Cases (as said by Lord Kenyon in *Neate v. Ball*, 2 East 117, 124,) are to be resorted to for the sake of the principle on which they were decided, and our opinions ought not to be governed by every little matter of difference which may be pointed out.

The parties to a contract for the sale of goods have, till the rights of third persons intervene, an undoubted right to rescind the contract.

I am aware that, according to some of the cases to which I have referred, it is in England held that there is no such right after an act of bankruptcy. See per Lord Kenyon in *Neate v. Ball*, 2 East 125. Per Lord Ellenborough in *Dixon v. Baldwin*, 5 East 186; and per Best, C. J., in *Bartram v. Farebrother*, 4 Bing. 583.

Assuming, but not deciding, that this qualification is applicable under our Insolvent Act of 1869, I fail to see in this case any evidence of an act of bankruptcy within the meaning of that Act, on the part of the insolvent prior to 30th November, 1874.

It was pointed out by counsel for the plaintiff during argument, that on 26th November, 1874, the vendee had allowed his paper to go to protest. This was not of itself, so far as I am aware, an act of bankruptcy under the Act of 1869: See section 13.

When the contract in this case was rescinded between the parties there were, in my opinion, no rights of third parties intervening which in any manner prevented the rescission.

I would have had great difficulty in attempting to reach this conclusion if the finding had been that the goods were before the alleged rescission actually accepted and received by the insolvent as his own; but the finding here is to the contrary.

I admit that there are some circumstances which tend to a different conclusion, but weighing the evidence as a whole, it amply supports the finding in favour of the defendants.

If it were not for the rescission of the contract it would be necessary to consider and determine the question as to fraudulent preference or payment. But as the contract was, I think, rescinded before the assignment in insolvency, that question cannot, it seems to me, be properly said to arise. But I may say I see no evidence whatever to sustain the count framed as upon a fraudulent preference or payment. See *Re Barnham, B. Foot*, 11 Nat. Bankruptcy Register Reports U. S. 153. The right of the plaintiff, therefore, if any, is entirely one of property.

In this view a further difficulty presents itself in the way of the plaintiff recovering in this action. It is that if the property in question can by any process of reasoning be said to be the property of the insolvent at the time of the assignment, it appears that plaintiff before action had transferred his right to the property to Messrs. Lamb & Cross, who are no parties to the action. The rule must be discharged.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

IN RE ATTORNEY.

Attorney—Misconduct—Application against.

On an application against an attorney to answer the matters in affidavits, the Court, upon the affidavits set out below, was not satisfied that the relation of attorney and client ever subsisted between the attorney and the applicants, though he had acted as attorney for a firm of which one of them was a member, nor that there was such professional misconduct as to require further action; there had been also a long delay in making the application, which was not satisfactorily accounted for; and the rule therefore was discharged. It appeared, however, that while acting as attorney for the assignee in insolvency of the firm, he had attempted as a creditor of the firm to secure a preference for himself. Such conduct was strongly censured, and the rule under the circumstances discharged without costs.

The authorities and practice as to such applications reviewed.

Stephens, during Michaelmas term, November 30, 1875, upon filing the several affidavits of Thomas Edward Jones, Elizabeth Gilbert Jones, Charles William Brown, and George Frederick Brown, as counsel for Thomas Edward Jones and Elizabeth Gilbert Jones, obtained a rule calling on the attorney to shew cause why he should not answer the charges and matters of complaint set forth in the said affidavits against him, on the ground that his conduct as therein set forth was and is a violation of his duty, and not befitting him as an attorney.

Thomas Edward Jones, who was a retired captain from Her Majesty's 97th Regiment of Foot, made oath that he sold out his commission in the army in the year 1872, and came to the Province of Ontario soon after: that he entered into business with his brother-in-law, Charles William Brown, and one Neave, who had been carrying on the business of wine merchants in Toronto, under the name of Neave & Brown: that he joined the firm on 15th November, 1872, and carried on business under the above name till the failure of the firm, which took place on 15th November, 1873: that the sale of his commission brought him £1,800 sterling, of which he put into the business \$4,000: that he set apart and agreed to give his wife, Elizabeth Gilbert Jones, and did give her, \$2,000 for her own use and

benefit: that this amount was invested in the Province of New Brunswick, on mortgage, in the name of deponent: that he always looked upon it as his wife's own separate estate: that the interest paid thereon was sent to his wife by draft, payable to her: that the reason he gave his wife any portion of the sale of his commission was because he considered her entitled to it, for if he had retained his commission and died in her lifetime, she would have been entitled to a pension as his widow: that from the time of his entering into the partnership, up to the time of the assignment in insolvency, the said attorney was the solicitor of the firm, and it was upon his advice that the assignment was made, and he was during all the time intimately acquainted with the affairs and condition of the firm, and had full knowledge of its difficulties: that in the month of April, 1873, more capital being required in the business, at the urgent request of his partners, deponent enquired of his wife if she would be willing to lend the said sum of \$2,000 to the business for a year on being properly secured, and after some hesitation on the part of his wife, she consented to lend the sum to the firm on the condition that the amount could be safely lent and properly secured, although for two months before the loan was made his wife refused to lend the money: that deponent then, through his brother-in-law, Charles W. Brown, consulted the said attorney on the subject, and he advised that the amount could be legally and safely advanced and secured: that on or about 14th June, 1873, deponent received from the attorney the letter produced of that date, and a draft agreement, also produced, being the security proposed by the said attorney to be given by the firm to deponent's wife: that the draft agreement is in the handwriting of the attorney: that unless deponent had been advised that the said sum could be safely advanced by his wife, deponent would not have allowed her to lend it: that she would not have given her consent to lend it had not deponent assured her that the said attorney had been consulted, and advised

that she would be quite safe in doing so : that on his advice the sum of \$2,000 was lent to the firm by his wife ; but the agreement was not executed or carried out, because he understood from the attorney's letter that the agreement might be executed at any future time : that the attorney charged the firm his professional fee for drawing the agreement : that shortly before the assignment in insolvency was made, deponent requested the said Charles W. Brown to see the said attorney, and ask him if the agreement should not then be signed, and the lien therein referred to given to his wife, but was informed that the said attorney then gave it as his opinion that it could not be done : that between the time of the money being advanced and the insolvency, the said attorney was the constant legal adviser of the firm, and was intimately acquainted with its affairs and difficulties, but did not during such period, or at any time, advise deponent nor his wife to have the agreement carried out and the lien therein referred to effected : that after the assignment was made, and while the attorney was acting as solicitor for the assignee of the estate, the attorney wrote a letter, dated 2nd December, 1873, which was also produced : that on reading the letter deponent asked the said Brown to go for him to the attorney, and ask him what he meant by it : that on his return the said Brown informed deponent that the attorney said he knew the deponent's wife had other means of her own besides the \$2,000 lent by her ; and that unless she gave an undertaking to secure him in the amount the firm owed him he would dispute his wife's claim to the \$2,000 : that after hearing this statement deponent consulted another attorney with respect to his wife's claim : that notwithstanding the letter of the said attorney, and acting on the advice received, deponent's wife made claim against the estate of the firm for the said \$2,000, but her claim was disputed and she was examined before the Judge of the County Court of York and the claim was disallowed : that the said attorney was appointed solicitor for the assignee of the

estate as soon as the assignment was made, and acted in such capacity throughout the proceedings in insolvency: that deponent was examined before the assignee touching his wife's claim against the estate: that Mr. Fleming, acting as solicitor for the inspectors of the estate, conducted the examination: that the said attorney was present, suggesting questions to be put to deponent by Mr. Fleming, and made use of knowledge and information received from deponent as solicitor for his wife and himself, to the prejudice of her claim against the estate for the said sum of \$2,000, which had been lent upon his advice; and that by the letter last mentioned he endeavoured to induce deponent to secure him in the debt owing to him by the firm, with the threat that if he was not so secured he would oppose the claim of deponent's wife to the \$2,000: that the said attorney carried out his threat by opposing the claim being allowed in every way he could, and at the very time he made the proposition for settling his claim he was the solicitor of the assignee, and thereby representing the creditors of the assignee: that deponent would have caused this application against the attorney to be made some months ago had he not been informed that the letters last mentioned had been filed with the assignee on the contestation of the claim of Mrs. Neave, the wife of deponent's former partner, made by her against the estate, and that it could not be obtained till the contestation was disposed of, but in this respect deponent afterwards learned that he was misinformed.

Elizabeth Gilbert Jones, the wife of the preceding deponent, made affidavit in all respects corroborating the statements contained in her husband's affidavit so far as she had any knowledge of what took place.

Charles William Brown, the brother of the last deponent, made an affidavit corroborating the affidavit of Thomas Edward Jones so far as he (Brown) had any knowledge of what took place. He added that the reason he went to see the attorney instead of Jones was because Jones was a lame man and not able to go about conveniently, having

lost a leg while in the army : that Jones requested deponent to consult with the attorney on his wife's behalf : that he did so : that the attorney advised him that his sister could safely lend the said sum to said firm and be secured : that on deponent asking the attorney what he meant by the last mentioned letter, he told deponent that he did not intend to lose any money by the firm of Neave & Brown, and that he was aware Mrs. Jones was entitled to other money of her own besides the \$2,000, and unless she gave him an undertaking to give up all notes as they became due which he had endorsed for the firm, and also pay his bill for legal charges against the firm in full, he would dispute her claim to the \$2,000, which he knew was not legally secured to her : that the attorney was present during the examination of deponent and Jones, when the said attorney was also present and assisted Mr. Fleming, the solicitor for the inspectors, who conducted the examination, and was frequently consulting with Mr. Fleming and apparently suggesting questions to be put by him.

The letter of the 14th of June, 1873, from the attorney was as follows :—

Toronto, 14th June, 1873.

Captain T. E. Jones.

Messrs. Neave & Brown,

Dear Sirs,

Enclosed please find what you require for Mrs. Jones's security for the loan of money by her to the firm of Neave & Brown. I have provided she shall have a lien or charge upon the stock in trade or book and other debts, or such other security as may be agreed upon. I would not advise the demand to be made as the granting of such a lien would utterly prostrate your business and ruin the credit of the firm, and the security can as well be made and given at any other future time as now, and when necessary she will be in a position to enforce it. I have not stated the term of years in which the money is to be repaid. I have added a bond for \$4,000 which will be beneficial in case of necessity. Please note any alterations or additions you may think of, which I will make.

Yours,

A. B.

The draft security enclosed was from the different members of the firm to Mrs. Jones and recited that the \$2,000 was the money of Mrs. Jones which she had agreed to lend to the business for the purpose of necessary capital, upon condition of repayment within the term of years, with interest in the meantime at the rate of 8 per cent. payable half yearly. It contained a covenant for the repayment of the money on the part of each member of the firm. It also contained an undertaking to grant a lien upon the stock in trade, or upon the book or other debts. This was secured by an expressed penalty of \$4,000.

The letter of date 2nd December, 1873, was as follows:

Without prejudice. Toronto, 2nd December, 1873.

Captain T. E. Jones, Toronto,

Re Neave & Brown.

By the notice given in this matter I see the meeting of creditors is to be on Monday. I have since the assignment washed my hands of the firm, as they are largely indebted to me and also for endorsing. I have a bond for \$5,000, and so do not care to lose anything. I understand Mrs. J. intends proving a claim for upwards of \$2,000, and claims to rank as a creditor of Neave & Brown for that amount, and so swell the liabilities. To this if I am paid in full or secured in full I will not object, but considering the money was yours and never hers I do not think it just or right I should lose any money by Neave & Brown and yourself get it. I prefer writing to you rather than communicating with Mrs. J's legal adviser, as he may represent other creditors who would be adverse to her claim. I have declined to act for either Mr. or Mrs. Neave, and am now looking after my own interests. I would like a reply before the meeting and oblige.

A. B.

During this term, May 26, 1876, *S. Richards, Q. C.*, shewed cause.

He filed an affidavit of the attorney. In it after stating the formation of the firm, he swore that Neave and Brown kept house together for upwards of two years, and down to about a month preceding the assignment: that deponent lived with them as a boarder or lodger for upwards of one year

down to about a month preceding the assignment: that he thus met them daily and they were in the habit of talking over their business affairs and prospects: that he was employed by the firm of Neave & Brown as their attorney from time to time when they had any law business requiring attention, and although he had no general retainer from them as their attorney he transacted their law business up to the date of the assignment: that he was also accommodation maker or endorser on negotiable paper of and for the firm from about the latter part of the year 1871 down to the assignment, and during that period was sometimes on their paper to the amount of \$3,000 or \$4,000 at a time: that in the month of August, 1873, a bond in the sum of \$5,000 was executed to deponent by the three partners, to save him harmless against loss on the negotiable paper: that he was in the habit of lending money to the firm from time to time in carrying on their business, and never charged or got any interest therefor except on one occasion for a loan of about \$400: that he was intimately acquainted with the members of the firm and with their business: that two or three months before Jones became a member of the firm deponent understood from Brown that Jones was in England trying to sell or dispose of his commission in the army, and that he was coming to Toronto and was to enter the firm and put into it the sum of \$4,000: that subsequently Jones did come to Toronto, became a member of the firm, and put the said money into the business: that within two or three months after Jones became a partner deponent was informed by Brown and Neave that Jones had a sum of money, part of the proceeds of the sale of his commission, invested in New Brunswick, which deponent understood them to say he had given to his wife: that the fact of this money being there was several times spoken of by them, and as they were nearly always hard up for money deponent mentioned either to Neave or Brown that the money so invested would be considered the money of Jones, and would be liable as such to the credi-

tors of the firm, and either then or subsequently Brown mentioned that if this was the case the firm might as well have the money and deposit it in a bank to enlarge their credit by means of it: that this was long before the writing of the letter of the 14th June, 1873, and before deponent was spoken to about the money having to be borrowed by the firm: that deponent had no personal knowledge when the \$2,000 was loaned to the firm, but was convinced it was loaned long before the writing of the letter of 14th June, 1873: that deponent never advised Thomas Edward Jones or Elizabeth Gilbert Jones, or any one on his or their behalf, that the \$2,000 could be safely or properly lent or advanced to the firm to be secured to her as against the creditors of the firm: that he never advised Jones or his wife, or any one on his or their behalf, to lend the \$2,000 to the firm on the security of the draft agreement or on any security whatever: that he never was spoken to or consulted by the said Elizabeth Gilbert Jones, or by the said Thomas Edward Jones, on the subject of lending said money or taking security therefor, although deponent saw him nearly three or four times a week during the whole time he was a member of the firm, and he could at almost any time have spoken to deponent on the subject if he had desired: that he was spoken to by Brown about the time of the date of the letter of 14th June, 1873, and was told that Mrs. Jones had lent the said firm the said sum of \$2,000 and wished security from the firm: that deponent informed him she could only get security as against the firm, and not against the creditors of the firm: that deponent never told or advised Brown that Mrs. Jones could be secured as against the creditors of the firm: that Brown did not then or at any time intimate to him that he consulted him on behalf of Mrs. Jones or on behalf of her husband, but deponent understood him he wished him on behalf of the firm to prepare such agreement or security as the firm could give as against themselves: that he never contemplated the agreement which he did prepare being

used to the injury of the firm : that if any mortgage had been executed or registered against the firm it would seriously have injured if not destroyed their credit, and as Jones was a member of the firm and had invested money in it, deponent thought it for his interest that the demand for a lien should not then be made, and so mentioned it in his letter : that he prepared the draft agreement in accordance with what he understood to be the wishes and instructions or directions of Brown on behalf of the firm, and as he was the only party who ever spoke to or instructed deponent about preparing it, deponent sent it to Jones, in order that he or his wife might examine the same and make such alterations or additions as they considered advisable in their own interest : that he expected the draft to be returned to him, but never saw it again until after it was filed on this application : that after sending the draft he was never spoken to by Jones or his wife about it, or about any security being given for the \$2,000, until a few days before the firm made their assignment in insolvency, when Brown spoke to deponent about giving a lien on the stock in trade to Mrs. Jones, when deponent informed him that they could not grant a lien which would be valid against the creditors of the firm : that at the time the assignment was made deponent was an accommodation maker and endorser on outstanding paper of the firm to the amount of \$559, all of which, amounting with protests and interest to \$570, deponent had to and did satisfy and retire out of his own means : that the firm were also indebted to him for professional services to the amount of \$215.52, after deducting all contra claims : that deponent subsequently proved his claim against the estate of the firm for the sum of \$775.81 : that deponent never received any information from Mrs. Jones relative to the \$2,000, nor to the best of his recollection did he ever get any information from her husband, and never was attorney or solicitor of either of them, but did professional business for the firm of which Jones was a member : that before he was spoken to by

Brown to prepare the draft agreement he had become fully aware that Captain Jones had money invested in New Brunswick, part proceeds of the sale of his commission, and whether he had ever heard anything about the facts or not as a creditor he (deponent) would never have allowed the said claim to be proved and allowed to his detriment without a full examination as to her right thereto: that the examination required to establish the facts on which the Judge of the County Court acted in regard to the claim was a simple one, a copy of which he produced: that he wrote the letter dated 2nd December, 1873: that at that time he was a creditor of the firm and had ceased to act in any way as the attorney of the firm; and as a creditor he was trying to protect his own interests, and was aware that Mrs. Jones was entitled to moneys or property part of her late father's estate, and the said letter was intended for her: that he told Brown that unless she gave him (deponent) an undertaking to secure him against the notes upon which he was liable and for his claim he would dispute her claim to the \$2,000: that as a creditor he submitted he had a right to dispute any claim he saw proper: that the evidence on the contestation of Mrs. Neave's claim was not commenced for more than a year after the letter of 2nd December, 1873, was sent to Jones: that this application, although made in the name of Jones and his wife, was as deponent believed really made by or at the instigation of Brown, and with a view to injure deponent in his relations with his present partnership of attorneys, stating his reasons for that belief, and shewing that for some time before the application he and Brown had not been on speaking terms.

There was also an affidavit filed by Mr. Neave. He swore that he always understood that the attorney had advised that the firm of Neave & Brown could not give any security to Mrs. Jones for the money that would be valid against creditors, but only such as would be binding on the members of the firm, as he said

that the money would be considered Jones's money, and the creditors of the firm would be entitled to it as against Mrs. Jones. In several other important particulars he corroborated the statements contained in the affidavit as to the loan of the \$2,000. He concluded by stating that the attorney in the preparation of the draft acted as the solicitor of the firm, and charged the firm therefor.

Richards, Q. C., mentioned that Captain Jones since the application had died. He argued that the attorney was not shewn to be the attorney of either of the applicants, but of the firm of which one of the applicants when living was a member. He submitted that the application should have been promptly made, and even if made in good time the affidavits which he filed sufficiently answered the matter contained in the affidavits of the applicants.

J. H. Cameron, Q. C., contra. The attorney was the solicitor of all the parties: *Pulling on Attorneys*, 3rd ed., 412; *Johnson v. Fesemeyer*, 3 DeG. & J. 13. His conduct was such as to make him amenable to the jurisdiction of the Court: *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543; *Re Stewart*, L. R. 2 P. C. 88, 95, and very reprehensible: *Re Knight*, 1 Bing. 91; *Austin v. Chambers*, 6 Cl. & F. 1, 38; *Johnson v. Marriott*, 2 Cr. & M. 183; *Grissell v. Peto*, 9 Bing. 1; and there was no such delay as to prevent the success of the application.

June 29, 1876. HARRISON, C. J.—It is of the greatest importance that transactions to which attorneys are parties should be *uberrimæ fidei*, and that the conduct of those who are accredited officers of the Court should be above suspicion. Per Wightman, J., in *Re Blake*, 3 E. & E. 34, 40.

It is of equal importance that the disciplinary power which the Court has over its officers, whom the public are bound to employ, should be exercised with stringency and determination. Per Lord Coleridge in *Re H.*, 31 L. T. N. S. 730, 731.

The recent cases in England shew that the Courts there

do not hesitate to deal summarily with the officers of the Court who are guilty of improper conduct, and the Courts in this country will, I doubt not, be equally alive to their duty in that respect. Per Richards, C. J., in *Re S.*, 14 C. P. 323, 330.

Where an attorney does that which involves dishonesty, it is for the interest of suitors that the Court should interfere and prevent a man guilty of such misconduct from acting as an attorney of the Court. Per Cockburn, C. J., in *Re Hill*, L. R. 3 Q. B. 543, 545.

We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interest of suitors, and we are to look to the character and position of the persons and judge of the acts committed by them upon the same principle as if we were considering whether or not a person is to become an attorney. Per Blackburn, J., in *Re Hill*, L. R. 3 Q. B. 543, 547.

In order to give the Court jurisdiction to entertain an application for an attorney to answer matters contained in an affidavit, or to strike him off the roll, it is not necessary that the misconduct of which he is accused should arise in a matter strictly between attorney and client: *Re Knight*, 1 Bing. 91; *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543.

The Court will not on such an application intend anything against the attorney. The accusation must be established with reasonable certainty: *Re S.*, 14 C. P. 323. See also *Re Stewart*, L. R. 2 P. C. 88.

An attorney has no right voluntarily to withdraw from one side of a cause and go over to the other side and communicate what he has acquired in the character of attorney for his former client: *Cholmondeley v. Clinton*, 19 Ves. 261.

Attorneys in partnership cannot dissolve their partnership as against their client without his consent, so as to enable the retiring partner as discharged to act against him: *Ib.*

But where an attorney has been employed in a cause and is afterwards discharged by his client (not on the ground

of misconduct) he may act for the opposite party unless it clearly and distinctly appear that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate: *Grissell v. Peto*, 9 Bing. 1; *Davies v. Clough*, 8 Sim. 262, 267; *Johnson v. Marriott*, 2 Cr. & M. 183.

The relation of attorney and client prevents the former disclosing any information made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposes in his legal adviser. But the privilege of the client does not extend to matters of fact which the attorney knows by any other means than by confidential communication with his client, though if he had not been employed as attorney he probably would not have known them: *Dwyer v. Collins*, 7 Ex. 639.

The Court will not exercise its summary jurisdiction over an attorney simply because he has from improper motives given information which might be used against a former client. There must be actual misconduct *qua* attorney by the adverse use of information while the relation of attorney and client is still subsisting, or by the betrayal of secrets relating to the client's business, obtained by the attorney while acting in a confidential capacity and also in consequence of his so acting: *Re Cutts*, 16 L. T. N. S. 715.

The test for determining whether the Court has or has not jurisdiction is whether if the attorney had been called as a witness the Court would or would not have held him justified in refusing to answer on the ground of privilege: *Ib.*

The Court will upon a *prima facie* case of misconduct made out by affidavit, and not amounting to an indictable offence, call upon the attorney as an officer of the Court to answer the same: *Re Blake*, 3 E. & E. 34.

It was held to be no ground for such an application that the attorney had advised his client to hand him over money which the Insolvent Debtor's Court, on the client's applica-

tion for his discharge, considered a misappropriation and for which he was remanded by that Court: *Smith v. Tower*, 2 Dowl. 673.

The Court does not sit to punish personal but professional misconduct: Per Blackburn, J., *Re Cutts*, 16 L. T. N. S. 715, 716.

The application should not be in the alternative, viz., that he answer the matters of an affidavit or shew cause why he should not be struck off the rolls: *Burton v. Earl of Chesterfield*, 9 Jur. 373; but see *Re Blake*, 3 E. & E. 34.

The application should be made within a reasonable time after the misconduct alleged: *Re —*, *Gent*, 2 B. & Ad. 766.

In *Garry v. Wilks*, 2 Dowl. 649, a lapse of three terms was deemed such delay as to defeat the application.

In answering the application, it is not sufficient merely to deny the charges in direct terms: *Re Crossley*, 6 T. R. 701.

Where the facts are at all complicated, it is usual to refer the matter to the Master for full investigation: *Dicas v. Warne*, 2 Dowl. 812; *Re Wright*, 12 C. B. N. S. 705.

Where it has been referred to the Master to examine into the charges and report to the Court, it is not competent to counsel for the accused to go into the evidence given before the Master: *Re Wright*, 12 C. B. N. S. 705.

Where a matter is referred to the Master, his report is the only thing properly before the Court: Per Erle, C. J., *Ib.*

This is the practice followed in the case of applications under the Railway Acts: *Re Oxlade and North Eastern R. W. Co.*, 1 C. B. N. S. 454, 477. It was departed from in a subsequent case, but the departure was found very inconvenient: *Re Nicholson and the Great Western R. W. Co.*, 5 C. B. N. S. 366.

It is no answer to the application that the applicant has already filed a bill in equity against the attorney for an account in reference to the transactions complained of: *Re Wright*, 12 C. B. N. S. 705.

If an attorney be called upon merely to answer matters contained in an affidavit, the Court will not order him to be struck off the rolls, without giving him an opportunity to be further heard : *Re H.* 31 L. T. N. S. 730.

The practice in such a case, where further proceedings are deemed necessary, is peremptorily to enlarge the rule to a future day, intimating that if the attorney choose to be further heard on that day with reference to the result contemplated as likely to follow from the rule, he may be further heard : *Re Wright*, 12 C. B. N. S. 705.

I am not clear in this case that the relation of attorney and client ever did subsist between the applicants or either of them and the attorney, or that there was such professional misconduct on the part of the attorney as to make it the duty of the Court, under the decided cases, to take further action against him.

If on these points I clearly saw my way to a different conclusion, still the delay in making the application has been so great or so loosely attempted to be justified, and the attempted justification so completely overthrown by the affidavit filed in answer, that I should not in a matter of such serious consequence to the attorney feel at liberty to proceed further summarily against him.

But although I do not clearly see my way to proceed further against the attorney at the instance of the applicant on the present application, I cannot shut my eyes to the fact that his conduct while acting as solicitor for the assignee, in attempting to secure a preference to himself, is anything but creditable to him. Had he succeeded his conduct, if his contention as to the \$2000 be at all well grounded, would have been a fraud on the general body of creditors represented by the assignee, whose legal adviser he was.

His subsequent conduct looks so much like carrying his threat into execution that the applicants are not to blame for making the application against him. He had not the excuse of a man ignorant of the law. His know-

ledge of law, as well as that knowledge of right and wrong which every attorney should possess, ought to have taught him not to write such a letter as he did on the 2nd December, 1873, and not to bargain for such a preference as he then attempted to secure.

An attorney who not only advises his clients as to matters of law, but when these clients are traders, and, to use his own language, "always hard up for money," gives them accommodation paper, and thereby gives them a fictitious credit, is not to be surprised if some day affairs take such a turn as to leave him in the lurch. And when that day arrives, instead of endeavouring to secure an undue advantage over other creditors, he should have the manliness to suffer, and the honesty to share like other creditors in the distribution of whatever property is available for creditors generally.

The rule will be discharged, but, under the circumstances, without costs.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

CROSS V. WILCOX.

*Justice of the Peace—Warrant to witness to testify—False imprisonment—
32-32 Vic. ch. 31, sec. 16, D.*

The plaintiff had laid information before the defendant, a magistrate, against G., for an assault, but afterwards decided not to proceed further. Defendant issued a summons, addressed to her, reciting the information, and requiring her presence on a day named, then and there to testify, &c., but she said she did not wish to go on; and on the same day she was arrested under a warrant issued by the defendant, which recited that she had refused to appear before him, and commanded her arrest "to answer to the charge, and to be further dealt with according to law." She was brought before defendant, but refused to go on with the charge, and a friend paid the costs for her, when she was discharged. These proceedings were taken, the defendant said, in order to get the constable's fees.

Held, that defendant was liable in trespass, for the plaintiff was not bound to proceed with the charge; and defendant had no right to issue the summons under sec. 16 of 32-33 Vic. ch. 31, D., or the warrant under sec. 17.

THERE were three counts in the declaration, of which the first was for trespass and false imprisonment.

The verdict was for the defendant on the second and third counts. It is not necessary, therefore, further to notice them.

The defendant, who was a magistrate, pleaded not guilty by statute, Consol. Stat. U. C. ch. 126, secs. 1, 2, 9, 10 and 11, a public Act.

The case was tried at the last Fall Assizes for the county of Ontario, before Gwynne, J., and a jury.

The plaintiff was a domestic servant in the employment of a Mr. Gordon, living near Whitby. His son, George Gordon, assaulted her, cutting her eye and swelling her nose. She, in consequence, on the 29th March last, appeared before the defendant, a magistrate for the county of Ontario, and laid information for the assault, and prayed that George Gordon might be summoned to answer summarily to the complaint. He was summoned. Afterwards she changed her mind, and did not desire to prosecute. The magistrate sent a constable to her, saying he wanted her to go on with the prosecution. She told the constable she did not want to go on with it. This was the day after she laid the information. The constable gave her a summons.

The summons was addressed to her, recited that information had been laid before the defendant for the assault, and that it had been made to appear to him on information that she was likely to give material evidence, and therefore required her presence at two o'clock on the same day at Ray's Hotel, in Whitby, then and there to testify, &c.

The constable on the same day again called upon the plaintiff, and arrested her under a warrant under the hand and seal of the defendant.

The warrant recited that the plaintiff had refused to appear before the defendant, and therefore commanded her arrest "to answer to the charge, and to be further dealt with according to law."

The plaintiff submitted to the arrest, and accompanied the constable to Whitby. The defendant then asked her to go on with the case. She refused. He said he would put her in prison, unless she went on with it. She again refused. The defendant afterwards read the charge, and asked the plaintiff to go on with it. She again refused, saying she had withdrawn the charge. Defendant then asked plaintiff if she was ready to pay the costs. Plaintiff said no, but she could soon get the amount. Defendant said plaintiff would have to go to gaol until she paid them. He then read the items of the bill of costs, amounting to \$10.45, and, as the plaintiff swore, was about to send her to gaol, when a bystander stepped forward and paid the amount. She was then discharged from custody.

This was the case for the plaintiff.

Counsel for the defendant objected, among other things, that under the first count there was no evidence of a trespass, and that the act of the magistrate in issuing a warrant for the arrest of the plaintiff was, under the circumstances, legal.

Counsel for the plaintiff submitted that the warrant could only be sustained under sections 16 and 17 of 32-33 Vic. ch. 31, D., and that these sections have no application to the prosecutor but only to an ordinary witness.

The learned Judge was inclined to think the latter contention correct, and so ruled.

The defendant was called as a witness on his own behalf, and swore that he issued the summons and warrant to compel the plaintiff to come to Whitby for the purpose of getting the constable's fees, as there was no fund to pay them, and that if he committed an error it was simply an error of judgment.

The learned Judge, at the close of the testimony for the defence, left the case to the jury on the first count as a question of damages, saying that in strict law the action would lie, but cautioning the jury against giving heavy damages.

The jury found for the plaintiff on the first count, \$15 damages, and for the defendant on the remaining counts.

In Hilary term, February 22, 1876, *McMichael*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a new trial had between the parties, on the ground that the verdict was contrary to law and evidence and the weight of evidence.

During this term, June 1, 1876, *Hector Cameron*, Q. C., shewed cause. The charge not being for felony the prosecutor had the right to abandon it. The sections of the 32-33 Vic. ch. 31 sec. 16, D., are inapplicable, and even if applicable the defendant had not taken the preliminary steps to the issue of the warrant made necessary by section 25 of the Act.

M. C. Cameron, Q. C., contra. The defendant had a legal right to do what he did: *Bennet et ux. v. Watson*, 3 M & S. 1: *Evans v. Rees*, 12 A. & E. 55. The action is not maintainable without proof of malice and want of reasonable and probable cause: *Sommerville v. Mirehouse* 1 B. & S. 652; *Pease v. Chaytor*, 3 B. & S. 620; *Bross v. Huber*, 18 U. C. R. 282.

June 29, 1876. HARRISON, C. J.—For any act done by a justice of the peace in a matter * * in which he has exceeded his jurisdiction * * any person injured thereby may maintain an action of trespass. See Consol. Stat. U. C., ch. 126, sec. 2.

Where a justice of the peace has assumed as a justice of

the peace, under colour of some Act, to do something which the Act under which he was proceeding can by no means justify, he may properly be said to have exceeded his jurisdiction.

Thus, when he issues a general warrant for the arrest of all persons, not naming any, in a particular house alleged to be disorderly: *Cleland v. Robinson*, 11 C. P. 416—commits a person for trial without the appearance of the prosecutor or examination of any witness: *Connors v. Darling*, 23 U. C. R. 541, or convicts without any previous information or summons: *Re Blake v. Beech*, Weekly Notes, 27th May, 1876, p. 180. See further *Regina v. Smith*, L. R. 10 Q. B. 604.

There is no law which declares that a person who lays an information against another for a common assault is bound to prosecute before the magistrate on peril of having a warrant issued for his or her arrest.

On the contrary, all the authorities concur that the policy of the law does permit the compromise of indictments for assault, and such compromises are frequently recommended and approved by the Court. Per Sir John Leach, in *Elworthy v. Bird*, 2 Sim. & Stu. 372.

The law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action * * But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. Per Lord Denman, in *Keir v. Leeman*, 6 Q. B. 321.

Where the offence charged was not confined to personal injury, but was accompanied by riot and obstruction of a public officer in the execution of his duty, these latter were held by the Court of Queen's Bench to be matters of public concern, and the compromise illegal: *Keir v. Leeman et al.*, 6 Q. B. 308. And the decision of the Queen's Bench was afterwards affirmed by the Exchequer Chamber. See *Keir v. Leeman*, 9 Q. B. 371.

In the Exchequer Chamber Tindal, C. J., at p. 395, in

delivering the judgment of the Court, said, "We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further. In the case before us, the offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence."

Besides, there is a great difference between a compromise of an offence, of which there was no proof here, and a mere refusal or neglect to prosecute. See, *Bishop* on Criminal Law sec. 267 et seq., 709 et seq.

The cases relied upon by counsel for the defendant fall much short of his contention on behalf of the defendant.

In *Bennet et ux. v. Watson et al.*, 3 M. & S. 1, it was held under the statute 1 & 2 P. & M. ch. 13, followed by the practice under that statute, that a justice of the peace may commit a married woman who is a material witness, on a charge of *felony* or *suspicion of felony*, brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance.

In *Evans v. Rees*, 12 A. & E. 45, a magistrate issued his warrant, reciting that on complaint made on oath before him of a misdemeanour plaintiff was a material witness, that the magistrate had issued a summons requiring plaintiff to appear to testify his knowledge; that the summons was proved before the magistrate to have been duly served, but plaintiff did not appear to testify, &c., and said that he would not; that it was necessary for the ends of justice that the plaintiff should appear at the next assizes to testify, &c. The warrant then commanded the constable to bring the plaintiff before the magistrate or some other justice, *to find bail to appear and give evidence* at the next assizes to testify, &c. The warrant was held bad for requiring the plaintiff to give bail at this stage of the proceedings.

But it is argued that the justice in the case before us had power to do what he did under secs. 16, 17 of 32-33 Vic. ch. 31, D.

Sec. 16 enacts that "If it be made to appear to any justice of the peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence *on behalf of the prosecutor* or complainant or defendant, and will not voluntarily appear as a witness at the time or place appointed for the hearing of the information or complaint, the justice shall issue his summons (G. 1) to such person requiring him to be and appear at a time and place mentioned in the summons, before the said justice, * * to testify," &c.

Sec. 17 enacts that "If any person *so summoned* neglects or refuses to appear at the time and place appointed by the summons, and *no just excuse* be offered for such neglect or refusal (then after proof upon oath or affirmation of the summons having been served upon him either personally or by leaving the same for him with some person at his last or most usual place of abode), the justice or justices before whom *such person* should have appeared may issue a warrant (G. 2) to bring and have such person at the time and place to be therein mentioned, before the justice * * * to testify as aforesaid," &c.

These sections in no manner apply to the case of a prosecutor unwilling to proceed, and entitled so to refuse, but only to the case of a material witness other than the prosecutor refusing to attend where the prosecutor is desirous of proceeding.

Besides, even if the 16th section could be so stretched as to embrace the case of such a prosecutor, it cannot be said that the prosecutor on a charge of assault, where no public interests are concerned, and who tells the constable who serves him with the summons that he does not mean further to prosecute, is without "just excuse" for not attending under the 17th section.

The warrant here, even if sufficient in form, was not, I think, under the circumstances, justified by either of the

sections mentioned or by any other section in any other Act of which I have any knowledge.

But supposing the sections, under the circumstances, authorized the issue of *a* warrant, they certainly do not authorize the issue of *such* a warrant as proved here.

The warrant authorized is, "to take E. C. and to bring and have him on," &c., "there to testify," &c.: G. 2, p. 357. The warrant issued was a command to the constable "forthwith to apprehend the said Eliza Cross, and bring her before me," &c., "*to answer unto the said charge, and to be further dealt with according to law.*"

A magistrate who by warrant causes the arrest of the prosecutor to *answer the charge contained in the information*, "and to be further dealt with according to law," may safely be said to have exceeded his jurisdiction.

Besides, underlying all these objections is, the objection that the power of the justice under sections 16 and 17 to issue summons and warrant, is conditional upon it being made to appear by *the oath or affirmation* of any credible person that any person within the jurisdiction of such justice is likely to give material evidence on behalf of the prosecutor, and will not voluntarily appear, &c.

In this case there was no such oath or affirmation, because I presume that no such oath or affirmation could with truth be made.

In no view is it possible to sustain the arrest. The warrant was issued when it ought not to have been issued, and if authorized was on the face of it a void proceeding.

And all this was done, as the magistrate naively swears, for the purpose of getting the constable's fees.

The magistrate who so blundered, and who can shew so little excuse for his blundering, is to be congratulated on having no more than \$15 damages against him in an action of trespass for false imprisonment. See *Corkety v. Hickson*, Ir. R. 10 C. L. 174.

The rule *nisi* will be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

REGINA V. THE CORPORATION OF THE COUNTY OF
WELLINGTON.

*Bridge in village—Liability of county to repair—37 Vic. ch. 16, secs.
17, 18, O.*

The leading road through the county of Wellington, running north and south, crossed the Grand River in the village of Fergus by the Tower street bridge, less than one hundred feet in width, which was built in 1834, and by that bridge only till 1850, when another bridge, more than one hundred feet wide, was built by a private owner of property in the village over the river at St. David street, about three hundred yards from Tower street. After that the travel along the leading road was divided between the two bridges. The county never by by-law assumed either bridge, but had granted money to aid in keeping up both.

Held, (the facts being more fully stated in the case,) that the county was not bound to repair the St. David street bridge, under the 37 Vic. ch. 16, secs. 17, 18, O., as being a bridge "necessary to connect a public highway leading through the county."

SPECIAL CASE, stated and agreed to by the Crown and by the defendants :

1. There is a road leading through the county of Wellington from the southern limit of the county through the town of Guelph and through Fergus and Mount Forest to Owen Sound.

2. This road has been a leading road through the county and travelled as such since 1848.

3. At first, and up to the time of the construction of the St. David street bridge hereinafter mentioned, the people using that road crossed the Grand River by the Tower street bridge, which was built about the year 1834, and which was then the only bridge within the limits of what is now the village of Fergus, crossing the Grand River. Travellers coming south and north turned at the corner of St. Andrew and Tower streets, and at the corner of St. Andrew and St. David streets.

4. Tower street bridge, and the river where it crosses it, is less than a hundred feet in width, and this bridge was originally built by Messrs. Ferguson and Webster, who laid out the village of Fergus on their own property.

5. In 1850 the St. David street bridge was built by Mr. Webster, who still owned much property in Fergus. This

bridge and the river where it crosses is over one hundred feet in width.

6. The county has never by by-law assumed or kept in repair the Tower street bridge, but it has made grants to aid in keeping it up under the general power vested in them, one of the said grants, for \$500, having been made in 1866, upon a petition from the municipality of Fergus. The commissioners of county roads, appointed by the county council, under the authority of the warden, expended about \$80 of county funds in repairing the Tower street bridge in 1874.

7. In 1860, the county council, on petition from the Reeve and council of Fergus, granted a sum of \$400 in aid of St. David street bridge. And in 1872, a grant of \$250 was made by the county council for the same purpose, on condition that the village of Fergus would contribute a similar amount. But the county has never assumed this bridge or repaired it. The county has made similar grants in aid of roads and bridges, not leading roads or bridges thereon.

8. Since the building of the St. David street bridge the traffic and travel through the county on the leading road aforesaid, from north to south, has been divided between the two bridges, it is impossible to say in what exact proportions.

9. The county, by purchase from the Guelph and Arthur Road Company, which was incorporated by Special Act in 1847, acquired in December, 1864, that part of the said leading road, extending from "Card's Corners," near Guelph, to the south end of the Tower street bridge.

10. Travellers using the St. David street bridge, and going south or north by said leading road, go by Bridge street between Tower street and St. David street.

11. St. Andrew's street is the principal business street of Fergus.

12. Persons going from Fergus to Orangeville, and having to cross the river, would use either bridge indifferently.

13. The St. David street bridge is, for the purposes of this indictment, admitted to be out of repair, and this

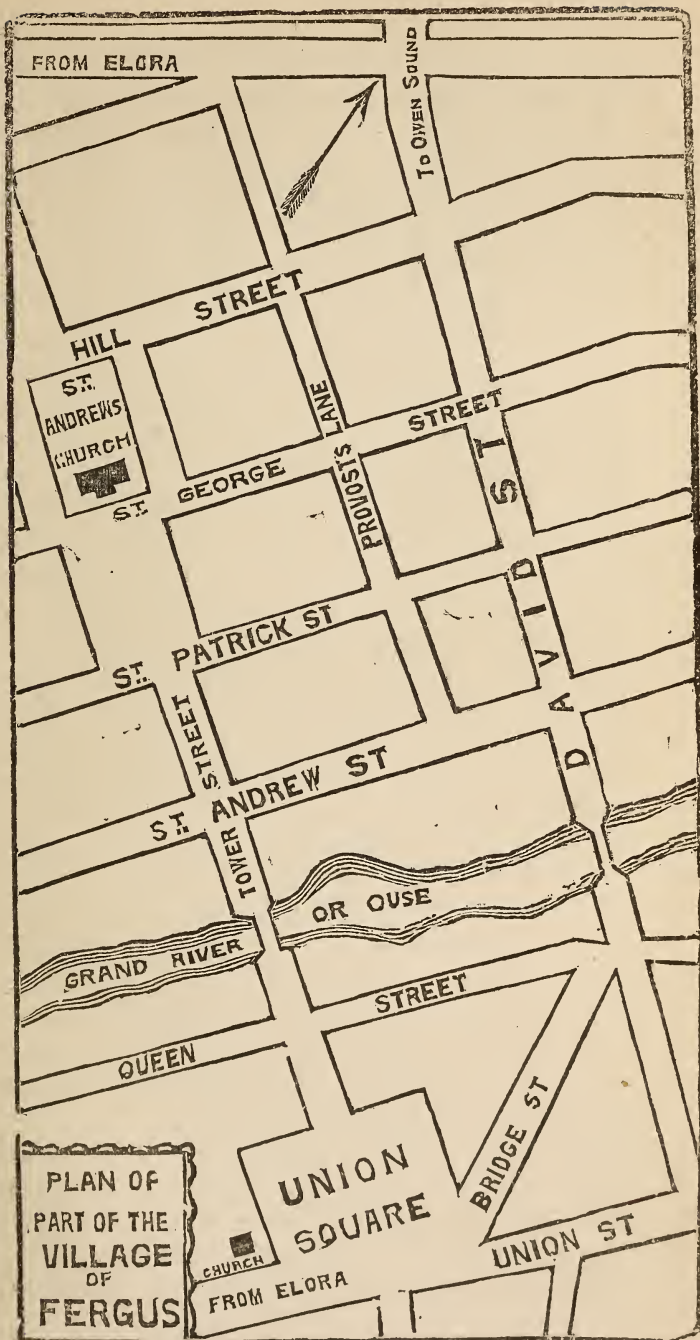
indictment is prosecuted at the instance of the village of Fergus.

The question is, whether under the facts above stated the county is bound to repair it. If the Court should be of opinion that it is so bound, then judgment is to be entered for the Crown. If not so bound, then judgment is to be entered for the defendants.

The sketch on the opposite page shews the position of the bridge.

In Easter Term, May 29, 1876, *Osler*, for the Crown. The question is, whether the defendants are bound to keep in repair St. David street bridge, in the village of Fergus, on which they have expended public money. They have not assumed it by any by-law. The bridge crosses the Grand River, which is there more than 100 feet wide. That bridge is in the line of the main road through the county from Guelph, which leads to Mount Forest and so to Owen Sound. In Fergus there is another bridge across the same river not far from the St. David Street bridge. The 36 Vic. ch. 48, sections 410, 412, and 413, as amended by 37 Vic. ch. 16 sections 17, 18, 19 applies here, because in this case no by-law is necessary to be made by the county assuming the bridge, in order to cast the duty of maintaining it upon the county; the river being at that part also more than 100 feet in width. This bridge also connects "a public highway leading through the county." The bridge was built in 1850 by the private owners of the property when they laid out the village. St. David Street is not an original allowance for road.

Robinson, Q. C., and *Guthrie*, Q. C. contra. There are in this county several villages through which there are streams over 100 feet in width and bridges over them, and it is important that the county should know whether they are bound to maintain all these different bridges. In 1842 the then district council passed a by-law to make a public road from Guelph to the village of Arthur. That part of the description which is material here is the portion of it



which relates to the village of Fergus. It begins at the north and comes "to the turn at St. David Street in the village of Fergus; thence along the centre of St. David Street and St. Andrew Street in the said village 32 chains, more or less, to opposite the tavern in Fergus"; then "commencing in the centre of Tower street opposite the tavern in Fergus; thence along Tower street across the Grand River 15 chains, more or less, to a turn in said street; thence along said street south 45° east, 23 chains 90 links, to the road to Garafraxa," &c. The 10-11 Vic. ch. 91, incorporated "The Guelph and Arthur Road Company," which company was empowered to plank, macadamize, or gravel the road "on and over that part of the country in the said district of Wellington lying between the said town of Guelph and the village of Fergus, on the direct line of road from the said town of Guelph to the said town of Arthur, and following as near as conveniently may be the direction of the present travelled road as laid out by the district council of the said district:" sec. 2. In 1864 the defendants bought the road from Guelph to the south end of Tower street bridge from the joint stock company. There is no straight line through Fergus by Tower street. Tower street bridge was built in 1834 by the then private owners of the property. And that bridge was part of the leading line of road through the county in 1842, and it was the only leading road up to the year 1850, when the St. David street bridge was built by the proprietors, and it is still the leading line of road. St. David street bridge has never taken its place, and it is plain the county cannot be required to keep up both of these bridges in the village. In 1860 the defendants granted \$400, and again in 1872 \$250, the latter sum on condition the village would give a like sum to repair St. David street bridge. These grants were made before counties were required to maintain village bridges, which connected a highway leading through the county, over streams which were over 100 feet wide. But the council never assumed that bridge. The county has gratuitously

aided other municipalities in like manner. In 1866 the village council petitioned the defendants for a grant to assist in building Tower street bridge, because owing to the great traffic upon it it had fallen into decay, and because it was a "thoroughfare forming the connecting link between the upper and lower portions of the Guelph and Mount Forest road," which road was the property of the county. By the Municipal Act of 1866 no provision was made for bridges in villages being maintained by the county.

By the 34 Vic. ch. 30, secs. 7, 8, the Act of 1866, sec. 341 and 342 were amended by making it obligatory on counties to maintain bridges in incorporated villages on any river over 500 feet in width, where such bridge connected any highway leading through the county. The Act of 1873, secs. 410, 412, reduced the width from 500 to 200 feet and the Act of 1874, 37 Vic. ch. 16, secs. 17, 18, to 100 feet. They referred to: *O'Connor v. Township of Otonabee*, 35 U. C. R. 73; *Kinnear v. The Corporation of the County of Haldimand*, 30 U. C. R. 398; *Lafferty v. Stock*, 3 C. P. 9; *Woods v. Municipality of Wentworth*, 6 C. P. 101; *Re Corporation of the County of Brant*, 19 U. C. R. 450; *Re Waterloo and Brant*, 23 U. C. R. 537; *Harrold v. Corporation of the County of Simcoe*, 16 C. P. 43, 18 C. P. 9.

Osler, in reply, referred to 20 Vic. ch. 106, which incorporated Fergus; *The Churchwardens of St. George's Church in Owen Sound v. The County of Grey et al.*, 21 U. C. R. 265; *Regina v. Corporation of Louth*, 13 C. P. 615, 618.

WILSON, J.—It is not necessary to refer to more than the provisions of the 37 Vic. ch. 16, secs. 17, 18, which are enacted in lieu of secs. 410 and 412 of the 36 Vic. ch. 48, to enable us to determine this case.

The first of these sections declares that "The county council shall have exclusive jurisdiction * * * over all bridges crossing streams or rivers over one hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county." And the second of these sections enacts that

“The county council shall cause to be built and maintained in like manner, all bridges on any river or stream over one hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county.”

The prosecutors, the incorporated village of Fergus, contend that the St. David street bridge is necessary to connect a public highway leading through the county.

The defendants contend that although it may be used by many of the public for that purpose, it is not necessary, because the Tower street bridge, which is only the width of one block or about 300 yards west from the other bridge, is the only one that is *necessary* for the public travel and convenience; and that bridge the county have ever since 1842, excepting for the time which the road company had possession of it, maintained and do still maintain it as a county work.

The Tower street bridge was built in 1834, while the other was not built until 1850.

The Tower street bridge is the one which since that time, but especially from 1842, has been used as connecting the public highway leading through the county. It is more in the direct line from Guelph to Fergus than the other, and it is very nearly, as a glance at the plan of the village will shew, as much in the direct line of travel from Owen Sound as the other.

In coming from Owen Sound and passing through the village to or towards Guelph, it is said the St. David street bridge is the more direct course.

That may be; but it is said St. Andrew's street, along which the turn has to be made from St. David street to reach the Tower Street bridge, is the great business street of the village, upon which the chief business of the village is carried on, so that most people are drawn towards the line of travel which leads to the Tower street bridge.

It does not follow that because the Tower street bridge was first built, and was, long before there was any obligation upon the county to do so, adopted as a county work,

that no other bridge of the village is ever to be adopted by the county council.

If the Tower Street bridge had, since the erection of the St. David street bridge, ceased to be used or to be much used by the public—if, in fact, the latter bridge had taken the place for public usefulness in all respects of the former one as the one used to connect the line of travel along the highways leading through the county—I am of opinion the county would have to adopt and maintain the new bridge, and very probably they would be at liberty to abandon the maintenance of the other.

So, if with the growth of the county and the increase of travel, more bridges than one in the village are necessary for the public travel along the highways leading through the county, the county must provide such additional bridge or bridges, because the words of the statute are that the county shall maintain *all bridges*, &c.

It may happen that a bridge is necessary in one part of the village to connect the highway to or from the north with the other highways of the county, and that another is necessary in a different part of the village to connect the highway to or from the south, or to or from some other direction with the other highways of the county. In that case the county may be obliged to provide and maintain as many bridges as may be *necessary* for the purpose.

If one bridge, however, will answer all these purposes, one bridge alone is all which the county can be called upon to provide.

There must be reason, consideration, and moderation exercised by claimants upon the county on such occasions.

The public convenience no doubt must be consulted, but caprice or whimsies are not to be gratified.

The county cannot be required to erect a bridge at the terminus of every street in the village which leads to the river, on the pretence that if one were built it would connect the highways leading through the county.

That might be true, but the statute has given the rule, and, as the guide in every case, it must be such a bridge

or bridges, which is or may be *necessary* to connect the highways of the county.

The Courts must be careful not to impose too heavy an obligation upon municipalities on the supposition or assumption that works of the kind should be erected. They create great expense to build, and constant expense and liability after their completion. The Courts must see that the public convenience is substantially provided for by all necessary works of the kind, which it is the duty of these bodies to afford. When that is done, everything beyond it is wasteful, and burdensome, and improper, simply because, according to the standard of the statute, it is not necessary.

Acting upon these principles, were the defendants rightly convicted in this case? I have no hesitation whatever in saying they were not.

The people who use the county roads which these bridges connect do not find it necessary to have the two bridges. And it is almost preposterous to say that a bridge only three hundred yards from the direct line of travel—assuming it to be so, are so inconvenienced that it is necessary the county should build another bridge of so expensive a nature and of such a length to avoid that deviation.

It is often said that a farmer will go a mile out of his way to avoid paying five cents of toll, and that is a distance of about six times as great as this alleged deviation; and measured by that rule the inconvenience charged here must be almost infinitesimal.

But I am of opinion there is no deviation, nor inconvenience, nor the slightest necessity for the county to assume and maintain the St. David street bridge.

It is not a question with the people of the county. It is an effort made by the inhabitants of the village to cast their burdens upon the shoulders of others who have no right to bear them. The villagers want a bridge for their convenience on St. David street, and they prefer the people of the county should build it for them. We do not think it

is reasonable, or just, or necessary, that the county should be obliged to do such a work.

The verdict of guilty must be set aside, and a verdict of not guilty entered upon the indictment; and the rule will be made absolute that the *postea* be delivered to the defendants, the cause having been tried on the civil side of the Court.

MORRISON, J., concurred.

HARRISON, C. J., had given an opinion in the case while at the bar, and therefore took no part in the judgment.

Rule absolute.

WILLIAM DAVIS STODDART, ADMINISTRATOR, AND JANE BELL, ADMINISTRATRIX OF THE LAST WILL OF WILLIAM STODDART, ANNEXED, V. JOHN EDWARD STODDART.

Action by administrator—Interested party—Corroborative evidence—36 Vic. ch. 10, sec. 6, O.—Statute of Frauds—Certificate of discharge of mortgage.

The plaintiff, as administrator, sued upon defendant's alleged promise to execute a mortgage to the testator on certain land, in consideration that the testator would discharge a mortgage which he then held thereon, so as to enable defendant to give a first mortgage on the land to one L. There was no evidence of this promise but that of the plaintiff, who admitted that he was directly interested in the money sought to be recovered.

Held, that under 36 Vic. ch. 10, sec. 6, O., the plaintiff, being an interested party, and his evidence not corroborated, could not recover, either at law or in equity.

Held, also, that the alleged promise required to be in writing, as relating to an interest in land, and on this ground as well the plaintiff must fail. The absence of the residence and occupation of the subscribing witness to a certificate of discharge of mortgage, on the face of the certificate, though stated in the affidavit: *Held*, clearly no objection, being cured by 36 Vic. ch. 17, sec. 8, O.

THE first count of the declaration alleged that in consideration that the testator would discharge a mortgage which he held from the defendant on certain land of the defendant for the sum of \$1,850, so as to enable the defend-

ant to give a first mortgage upon the said land to one James Long for \$1,300, the defendant promised forthwith to prepare, execute, and deliver to the testator a mortgage upon the said land, subject to the mortgage to James Long. Averment of performance of conditions precedent. Breach: refusal to give the second mortgage.

The remaining counts of the declaration, as originally framed, were for money lent, &c., by the testator to the defendant.

The pleas were—To the first count:—1. Did not promise. 2. Rescission of the contract by mutual agreement before breach. 3. Statute of Limitations.

To the remainder of the declaration:—4. Never indebted. 5. Payment. 6. Set-off. 7. Statute of Limitations.

The plaintiffs took issue on the first, second, third, fourth, fifth, and seventh pleas. Replications to the sixth plea:—

1. Never indebted. 2. Statute of Limitations.

Issue.

The plaintiffs afterwards obtained permission to add a count to the effect, that the defendant by deed, dated 28th March, 1862, covenanted with the testator to pay him \$1,850 by instalments, on days named, alleging non-payment as a breach.

The pleas to the added count were:—1. Traverse of the deed. 2. Payment. 3. That the covenant was contained in a mortgage on certain lands, which mortgage was before suit satisfied and discharged according to law, and that the liability of the defendant on such alleged covenant was thereby released.

Issue on these pleas.

The cause was first tried before Burton, J., and a jury, at the Barrie Spring Assizes for 1875, when the jury failed to agree.

It was tried a second time before Gwynne, J., and a jury, at the Barrie Fall Assizes for 1875, when the learned Judge nonsuited the plaintiffs.

The motion is against the nonsuit.

The mortgage from the defendant to the testator for \$1,850, dated 28th March, 1862, was produced and proved.

The discharge of it by the testator under the statute, dated 29th January, 1869, was also produced and proved. So was the mortgage from the defendant to James Long, dated 30th January, 1869.

The testator died on 18th October, 1873.

This action was not commenced till 5th January, 1875.

The only testimony in support of the promise alleged in the first count of the declaration was that of the plaintiff, William Davis Stoddart. He swore that the testator came for him to go and see the defendant in June, 1869: that they went together to see the defendant: that the testator said to defendant he came to try and get a settlement with him: that he, testator, wanted a new mortgage for the one he had discharged: that he asked defendant if he had made out a new one: that defendant said he had not, but would do so. He also swore that in the conversation what the discharge had been given for was spoken of: that defendant said the testator had done him a good turn in discharging the mortgage to enable defendant to borrow from Long: that he said he would have another mortgage properly executed and deliver it to the testator.

There was also some conversation about money lent, which is of no consequence in the face of the plea of the Statute of Limitations.

It was proved that the plaintiff and defendant were not on good terms—scarcely, if ever, having spoken since 1869—and that in 1874 there was a suit brought by defendant against plaintiff for defamation, wherein the latter succeeded.

The plaintiff admitted, on cross-examination, that he was directly interested in the moneys sought to be recovered in this suit: that he had paid to the legatees under the will \$500 more than he had received, and that he and his sister were now really the only persons interested in the moneys sued for.

At the close of the plaintiffs' case, it was objected on the part of the defendant that the contract in the first count alleged was void, for want of writing, under the Statute of Frauds: that under section 6 of the Evidence Act of 1873

there was no corroboration of the plaintiffs' evidence to entitle him to a verdict; and that, as to the third or added count, as the plaintiffs' case was based on the original mortgage, it having been discharged, the third plea was proved.

The counsel for the plaintiffs, as to the third or added count, argued that the plaintiffs were entitled to recover under the mortgage produced, unless a release under seal was proved or a statutory discharge, and submitted that the discharge, for reasons hereafter mentioned, was insufficient. He also argued that the promise alleged in the first count was not affected by the statute of 1873, and if it was, he asked, under the 2nd section of the Administration of Justice Act of 1873, to amend the count by shewing a right to sue as for a money demand in equity, notwithstanding the discharge of the mortgage.

The learned Judge ruled that William Davis Stoddart was an interested party within section 6 of the Evidence Act, 36 Vic. ch. 10, O., and could not recover either at law or in equity, his testimony being uncorroborated.

The learned Judge also ruled as to the added count, that the third plea was proved.

The counsel for the defendant contended that the discharge of mortgage was void, inasmuch as it did not on the face of it state the residence or occupation of the witnesses, and that the affidavit of the witness was not sufficient in not saying that the witness was present.

The affidavit of execution, which was endorsed on the discharge, was as follows:—

COUNTY OF SIMCOE, } I, Wilson Stoddart, of the village
To wit: } of Bradford, in the county of Simcoe,
farmer, make oath and say:

1. That my name, place of residence, and occupation or calling are correctly set forth as above.

2. That I was present, and, together with another subscribing witness, did see the execution of the within certificate of discharge of mortgage by William Stoddart, party thereto, and that I am a subscribing witness to such execution, and that the certificate of discharge of mortgage was executed at Bradford aforesaid.

3. That I know the said William Stoddart.

The learned Judge ruled that the first objection was cured by 36 Vic. ch. 17, sec. 8, and that the second objection was not good in fact.

The counsel for the plaintiffs then asked to be allowed to call the defendant in support of the plaintiffs' case. He proposed to prove by him that defendant got the testator to discharge the mortgage. He admitted that he did not expect to prove by him that defendant undertook to give a new mortgage, but that defendant would say he expected to have to pay the amount of the first mortgage.

The learned Judge ruled that such evidence, even if given as proposed, would not be sufficient to be corroborative of the allegation, upon which alone he considered the plaintiff could recover in equity, namely, that by fraud defendant succeeded in obtaining the discharge of the first mortgage: that the father might have been quite willing to take a verbal promise of the defendant to pay the amount without any other security; and that had such a promise been made, it would have been exhausted after the lapse of six years.

So the learned Judge ruled that the evidence proposed to be given, if given, would not be corroborative within the meaning of section 6 of the Act of 1873.

He therefore, upon the whole case, nonsuited the plaintiffs, with leave to move the Court to enter a verdict for them on the added count for the principal amount of the old mortgage.

During Michaelmas term last, November 15, 1875, McCarthy, Q. C., obtained a rule *nisi*, calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had between the parties, on the ground that the evidence of the plaintiff William Davis Stoddart, without being corroborated, entitled the plaintiffs to a verdict, and on the further ground that the evidence of the said plaintiff was corroborated by other material evidence; or why the nonsuit should not be

set aside and a verdict entered for the plaintiffs on the third count, pursuant to leave reserved, for the amount of the mortgage debt and interest.

During Hilary term last, February 23, 1876, *C. Robinson*, Q. C., shewed cause. The objections to the discharge of the first mortgage were cured by 36 Vic. ch. 17, sec. 8. There was no proof of the promise to give a new mortgage, except the testimony of the plaintiff. He was a party interested, within the meaning of 36 Vic. ch. 10, sec. 6, O., whose testimony required corroboration, and there was no corroboration of his testimony. The promise, even if proved, was void under the Statute of Frauds: *Johnstone v. Cowan*, 25 U. C. R. 470.

McCarthy, Q. C., contra. The mortgage was not so discharged as to prevent the action being brought on the covenant. If discharged, the promise to give a new mortgage was sufficiently proved by the testimony of the plaintiff, whose evidence under the statute did not require corroboration. If corroboration was necessary, there was sufficient; and the facts, at all events, shewed a resulting trust in favour of the testator, and so there was a right in equity to recover against defendant. He cited *Plowden*, 204; *Hawkins v. Gathercole*, 2 DeG. M. & G. 20; *Dwarris on Statutes*, 556, 574; *Consol. Stat. U. C. ch. 82*, p. 837; *Carrick v. Smith*, 35 U. C. R. 348; *Owen v. Kennedy*, 20 Grant 163.

May 15, 1876. HARRISON, C. J.—The first question is, as to the right of the plaintiff to recover under the third, or added count of the declaration.

The third count is framed on the covenant to pay, contained in the mortgage of the 28th March, 1862. The third plea to that count is, that the mortgage which contained the covenant was before suit satisfied and discharged according to law, and that the liability of the defendant on the alleged covenant was thereby released.

If the mortgage were released by deed executed by the proper parties, and there was no fraud in the procurement of the deed of release, all remedy on the covenant contained in the mortgage would be at an end.

The statute 31 Vic. ch. 20 sec. 60, O., declares that the certificate of discharge provided for by that Act, given and recorded as that Act directs, "shall be deemed a discharge of such mortgage," and "such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

The certificate of discharge is to be in the form J. in the appendix to the Act, or to the like effect, executed in the presence of one witness and duly proved by the oath of the subscribing witness thereto: 31 Vic. ch. 20 sec. 60.

The form J., after the attestation clause, concludes as follows:

"One witness, } Stating residence and occupation."

The principal objection made to the certificate of discharge at the trial was, that although the name of the witness, "Wilson Stoddart," and although his residence and occupation appear in the affidavit endorsed on the certificate, yet neither residence nor occupation is stated on the face of the certificate, at the foot of the attestation clause, as required by the statute.

The case of *Carrick v. Smith*, 35 U. C. R. 348, shews how little disposed the Courts are now to avoid instruments of this kind on account of mere formal omissions or formal defects.

But the Legislature, so far as the present objection is concerned, has removed all doubt on the point by declaring in 36 Vic. ch. 17 sec. 8, O., that "It shall not be necessary that the residence or occupation of the attesting witness to any certificate of discharge of mortgage shall be stated in the attestation clause thereof; nor shall any such certificate heretofore registered be invalid or inoperative by reason of the omission to state in such attestation clause the residence or occupation of any such attesting witness."

There is nothing, in my opinion, in either of the objections urged to invalidate the certificate of discharge of mortgage.

So the third plea to the added count is proved, and the plaintiffs were rightly nonsuited as to that count.

All claim to recover for money lent is met by the plea of the Statute of Limitations.

The next question is, as to the right of the plaintiffs on the evidence to recover under the first count of the declaration.

The defendant contests this right on the following grounds:—

1. That the testimony of the plaintiff, under the statute 36 Vic. ch. 10, sec. 6, O., was not sufficient without corroboration.
2. That there was no corroboration.
3. That if the promise were proved, it was void under the Statute of Frauds, not being evidenced in writing.

The statute 33 Vic. ch. 13, O., intituled, "An Act to amend the law of evidence in civil causes," recited that the enquiry after truth in civil causes is often obstructed by incapacities created by the present law, "and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses and truth of their testimony."

It thereupon declared that no person offered as a witness should thereafter be excluded by reason of incapacity from crime or interest from giving evidence, and expressly made admissible the parties to a suit, &c., and the persons in whose behalf any suit, &c., may be brought or defended.

But, notwithstanding, there were certain exceptions created to the operation of the Act. Among these was the following: "And nothing herein contained shall, in any action, suit, or other proceeding *by or against* the personal representative or representatives of any deceased person, render competent or authorize *any party* to such action suit or proceeding, to be called as a witness on behalf of such party as to any matter occurring before the death

of such deceased person ; but such party may be called as a witness at the instance of the opposite party " : sec. 5, sub-sec. *e*.

It may have been that all the Legislature intended by this enactment was, to protect the estate of a deceased person from the false swearing of the living party to a suit by or against the estate of the deceased : See *Hill v. Wilson*, L. R. 8 Ch. 888 ; but the language is such as to exclude from giving evidence " *any party* " to such a suit, &c.

There are at least two parties to an action at law ; and a statute which prevents " *any party* " to such an action from giving evidence on his own behalf, in my opinion in effect declares that neither party to such suit shall do so.

The Legislature in such a case must be intended to have meant what they have actually expressed, unless a manifest incongruity would result from so holding, or unless the context clearly shews that such construction would not be right : See per Parke, J., in *Rex v. Inhabitants of Banbury*, 1 A. & E. 136, 142. When once the intention is plain, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary : Per Pollock, C. B., in *Miller v. Salomons*, 7 Ex. 475, 560. In short, a Court is not at liberty to speculate on the intention of the Legislature when the words are clear, or to construe an Act according to its own notions of what ought to have been enacted : Per Jervis, C. J., in *York and North Midland R. W. Co. v. The Queen*, 1 E. & B. 858, 864.

The statute 33 Vic. ch. 13, sec. 5, sub-sec. *e*, O., was repealed by the 36 Vic. ch. 10, sec. 5.

The following enactment was then made, as a substitute for the repealed enactment : " In a suit *by* or *against* the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision, thereon on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence " : 36 Vic. ch. 10, sec. 6, O.

The effect of this Act is, to render both parties to the suit admissible witnesses, subject to the declaration that "an *opposite* or *interested* party to the suit" shall not obtain a verdict, &c., on his own evidence in respect of any matter occurring before the death, unless corroborated by some material evidence.

The doubt, if any, arises on the words "or interested." If the provision had been simply that in a suit *by* or *against* the heirs, executors, &c., of a deceased person, an *opposite party* shall not obtain a verdict on his own evidence without corroboration, the effect might have been to permit the executor, whether interested or not in the result of the suit, on his own unsupported evidence to recover a verdict—for the only exclusion would be of "the opposite party."

If this were the enactment the result would be unfair, for it would enable an executor, although interested, to recover a verdict on his own evidence without corroboration, and would leave the oath of the defendant, on the contrary, if uncorroborated, as of no value ; but if the language were as supposed and nothing more, we should have to give effect to the language used, however unjust the result ; but some force must be given to the additional words, "or interested party."

An interested party to a suit is a party having an interest in the result.

Mr. McCarthy argued that all the Legislature meant was, in the case of an opposite party to require corroboration, and that as in equity a party may be on the same side with an executor, plaintiff or defendant, and yet opposed to that side in interest, the intention was *only* to exclude a party so placed when interested.

I cannot accept this narrow interpretation of the Act. I can only judge of the meaning of the Legislature when passing this Act, as I did their meaning when passing the Act which it repeals,—and that is by the language actually used, giving to it, its plain and ordinary meaning unless there be something on the face of the Act to shew that a different meaning was intended.

The language not only requires corroboration in the case of "an opposite party," but of "an interested party." If an executor be a bare trustee, if he have no beneficial interest in an estate, his evidence would not, I presume, require corroboration. But if he be beneficially interested in the result of a particular suit there is as much danger of his swearing falsely as of his adversary swearing falsely. In such a cause the reason, whether it be good or bad, which excludes the one, should exclude the other. I agree therefore with the learned Judge, who nonsuited the plaintiffs' in thinking that this is the proper construction to be placed on the statute in question.

The only person who testifies to the promise in the first count, is the plaintiff, W. D. Stoddart. That promise is that, although the testator certified the first mortgage to have been paid and discharged, the defendant would give a new mortgage. If the plaintiff's testimony were wholly excluded there would be no evidence whatever of such a promise. And so I think it cannot be said the testimony of the plaintiff is corroborated by some "other material evidence." In this particular also I concur with the learned Judge in his ruling at the trial.

But, independently of these objections, it appears to me that it is impossible for the plaintiffs on the evidence adduced to succeed in this case. Suppose the plaintiff's testimony to require no corroboration or suppose it corroborated by material evidence, other than his own, to the fullest extent, the agreement proved is that in consideration of the testator releasing one mortgage on land the defendant promised to give another mortgage on the same land. *Johnstone v. Cowan*, 25 U. C. R. 470, it appears to me is a direct authority to shew that in such a case such an agreement relates to an interest in land, and unless in writing cannot be enforced. See also *Taylor v. Knowles*, 30 U. C. R. 200; and *Sanderson v. Graves*, L. R. 10 Ex. 234.

It was, however, contended by Mr. McCarthy, although there is nothing on the point in the rule *nisi*, that under any circumstances the facts shewed a resulting trust in

favour of the testator, which entitled the plaintiffs, as his representatives, to equitable relief; and that the claim is of a purely money demand within the meaning of section 2 of 36 Vic. ch. 8, O., and so the claim ought to be enforced in the present action. But there is the same difficulty in the way of the plaintiffs' recovery for such a claim as there was in the way of their recovering for breach of the agreement alleged in the first count, and that is the want of corroboratory evidence. If nothing appeared but the fact of the discharge of the mortgage made by the son to the father, and this without payment of the mortgage money by the son to the father, there would be a presumption of advancement: *Owen v. Kennedy*, 20 Grant 163.

It may be open to the plaintiff to rebut the presumption of advancement by oral proof that such was not the intention of the testator at the time he discharged the mortgage; but where the executor is himself directly interested in the result of a suit for such a purpose, the case comes under the statute, which declares that in such a case the plaintiff "shall not obtain a verdict, judgment, or decision" thereon "on his own evidence," in respect of any matter occurring before the death of the deceased, "unless such evidence is corroborated by some other material evidence."

It follows that the consideration of the claim, whether viewed as a legal or equitable one, necessarily brings us back to the construction of the statute 36 Vic. ch. 10, sec. 6, O.

I have already said all that I think necessary to be said on that point, and, for the reasons already given, am of opinion that the nonsuit was proper.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

MCQUADE V. LIZARS AND MCPHERSON.

Unauthorized issue of execution—Seizure thereunder—Trespass.

An action of trespass will not lie against a person who without authority procures the issue of an execution on a judgment admitted to be valid and satisfied, and the seizure of the plaintiff's goods thereunder.

To a declaration against L. and M., in trespass for taking plaintiff's goods defendants pleaded that one C. recovered a judgment in the County Court against the plaintiff, on which he, by defendant L. as his attorney, sued out a *fi. fa.*, which was returned *nulla bona*, and that afterwards, the judgment remaining in force and unsatisfied, defendant L. instructed defendant M. to and defendant M. did issue an *alias fi. fa.*, on which the plaintiff's goods were seized, which are the alleged trespasses. The plaintiff replied that defendant L., when he so instructed defendant M., was Judge of the County Court, and had ceased to be C.'s attorney, and had no authority from C. to issue the *alias fi. fa.* Defendants rejoined that the *alias fi. fa.*, at the time of the seizure, was in full force, and not then or at any time annulled or set aside. *Held*, on demurrer, that the rejoinder was good.

.DEMURRER. Declaration : that the defendants seized and took the plaintiff's goods, that is to say : one horse, one cow, one set of harness, &c., and carried away the same and disposed of them to their own use, whereby the plaintiff was prevented from carrying on his business as a farmer and suffered great pain and distress of mind, and was injured in his credit and otherwise.

Third plea : that before any of the alleged trespasses one John Curran, on the 9th day of October, 1857, recovered a judgment against the plaintiff in the County Court of the county of Perth for £35 damages and £12 19s 8d costs, on which said judgment the said John Curran, by the defendant Daniel Home Lizars, his attorney, on the 17th day of October, 1857, sued out a writ of *fi. fa.* against the goods and chattels of the plaintiff, directed and delivered to the sheriff of the county of Perth for execution, which said writ was afterwards returned by the said sheriff *nulla bona* ; and the said judgment remaining in full force and wholly unsatisfied, the said defendant, D. H. L. instructed the defendant George Gordon McPherson to, and the said G. G. McP. did, on the 30th day of May, 1873, issue out of the said Court an

alias writ of *fi. fa.* against the goods and chattels of the plaintiff, directed to the sheriff of the county of Perth for execution, whereby the sheriff was commanded that of the goods, &c., of the plaintiff in his bailiwick he should cause to be made the amount of the judgment which John Curran had in the said Court recovered against the plaintiff, &c., and that the sheriff should return said money and writ, which said writ was endorsed with a direction to the said sheriff to levy the debt and the costs taxed in the said cause, together with interest on both sums from the 9th day of October, 1857, and fees for writs, &c., and subsequent expenses, and on which said writ was also endorsed a certificate of the Judge of the said Court that the said execution was for the recovery of a debt contracted before the 19th day of May, 1860; and the said writ so endorsed as aforesaid was then delivered to the sheriff of the said county for execution, and thereupon the sheriff by virtue of the said writ, and within his own bailiwick, did seize and take the goods and chattels of the plaintiff for the purpose of levying the moneys so directed to be levied as aforesaid, which are the alleged trespasses.

Replication. The plaintiff admits the recovery of the judgment and the issue and return of the writ of *fi. fa.* against goods and chattels in the said plea first above mentioned; and as to the residue of the said plea, the plaintiff says, that at the time the said defendant D. H. L. authorized the said defendant G. G. McP. to issue the said *alias* writ of *fi. fa.* against the goods and chattels of the plaintiff, he, the said D. H. L., was Judge of the County Court of the County of Perth, and had ceased to be the attorney and retained for the said John Curran, and had no authority from the said John Curran to authorize or direct the said G. G. McP. to issue the said *alias* writ of *fi. fa.*, and the issue thereof was wholly unauthorized and unwarranted, and the delivery thereof to the said sheriff, and the seizure of the plaintiff's said goods, were, and was, wholly unauthorized by the said John Curran.

Rejoinder: that the said *alias* writ of *fi. fa.*, at the time when the said sheriff did seize and take the said goods and

chattels of the plaintiff as aforesaid, was in full force, and was not then, or at any other time reversed, annulled, or set aside.

Demurrer to the rejoinder on the grounds: that the said rejoinder is no answer to the plaintiff's replication; it admits that the *alias writ fi. fa.* was issued without the authority of the plaintiff therein by direction of the defendant D. H. L., and the seizure of the plaintiff's goods thereunder, and assumes that a stranger to the suit may enforce a writ that is regular in form, without authority from the plaintiff. Though the writ would be a protection to the sheriff, it is no protection to those who have improperly set it in motion as the replication shews the defendants have. Joinder.

February 29, 1876. The demurrer was argued. *M. C. Cameron*, Q. C., for the plaintiff. The plea shews the recovery of judgment and issue of *fi. fa.* and return *nulla bona*, and the issue of an *alias fi. fa.* by the original attorney, without any new authority from the client, and after the attorney had ceased to be an attorney. The authority of an attorney only goes to the entry of judgment, and the regular enforcement of it; *Mooney v. Maughan*, 25 C. P. 244.

Stephens, contra. *Blanchenay v. Burt*, 4 Q. B. 707, is an authority for the rejoinder. It makes no difference that the plaintiff in the former suit gave no authority, or that the writ might be a void writ, the writ is a protection to all acting under it till set aside; *Riddell v. Pakeman*, 2 C. M. & R. 30. This plaintiff cannot take exception to the rejoinder, for his pleadings admit that he owes the money under a valid judgment. See also *Moody v. Tyrrell*, 6 P. R. 313.

March 17, 1876. GWYNNE, J.—This action is, I think, misconceived.

In *DeMedina v. Grove*, 10 Q. B. 172, 177, Wilde, C. J., delivering the judgment of the Exchequer Chamber, says: "There is no authority to shew that the employment of

either mesne or final process will furnish ground of action against the person employing it, unless he acted maliciously and without probable cause."

And in *Cotterell v. Jones*, 11 C. B. 713, 730, Williams, J., says: "It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable and probable cause."

All that the plaintiff complains of is, that he has been compelled to pay a debt legally due by him, under process of a writ of execution issued upon a judgment recovered against him, which remains unsatisfied, such writ having been issued, as he says, without the authority of the judgment creditor, by the instruction of the gentleman who was his attorney in the cause to judgment, but who, having since become a Judge, has ceased to be an attorney. The writ is a lawful and valid writ, and authorized the taking which is complained of as a trespass. What is complained of therefore is, that the procuring of that writ to issue was an improper use by the defendants of the process of the Court.

That may be a proper subject of enquiry upon a motion to the Court, in which case it would seem to be necessary to establish that there has been a *wilful* abuse of the process: *Collins v. Johnson*, 16 C. B. 588, 612, per Cresswell, J.

It may be said that in this case the defendant Lizars appears to be Judge of the Court out of which the process issued, and so that no motion could be made in the matter to him. I apprehend, however, that if there be any foundation for such a motion, means can be taken to have it brought up in some manner. Upon this demurrer all I have to decide is, that, under such circumstances as appear upon this record, an action of trespass does not lie against the defendants.

I may add that it is easy to conceive that the defendant Lizars, who was the attorney of the judgment creditor in the action against the present plaintiff, notwithstanding his

having become a Judge, may have had ample authority to procure the issue of the *alias* writ; and that if in so far as appears the present plaintiff's sole damage is, that he has been obliged to pay a judgment otherwise unsatisfied, he may find difficulties in the way of his proceeding by motion also. See *Coleman v. Biedman*, 7 C. B. 871.

Judgment for defendant on demurrer.

During this term, May 19, 1876, the foregoing judgment on demurrer was reheard before the full Court.

M. C. Cameron, Q. C., for the plaintiff. The simple question is, whether a stranger to a suit has a right to take advantage of legal process to collect a debt. The retainer of an attorney ceases with issue of execution. He cited *Reynolds v. Howell*, L. R. 8 Q. B. 398; *Macbeath v. Ellis*, 4 Bing. 578; *Lovegrove v. White*, L. R. 6 Q. B. 440.

C. Robinson, Q. C., contra. This is not an action against an attorney. The cases cited are by clients against their attorneys for using their names without authority. This case is different. Here defendant complains that he is compelled to pay a valid debt. It is not alleged on his behalf that the issue of execution was malicious, or without probable cause. He cited *Cotterell v. Jones*, 11 C. B. 730; *Blauchenary v. Burt*, 4 Q. B. 707; *Jones v. Williams*, 8 M. & W. 349; *Addison on Torts*, 4th ed., 621; *Williams v. Smith*, 14 C. B. N. S. 596.

M. C. Cameron, Q. C., in reply. The writ is no protection: *Brooks v. Hodgkinson*, 4 H. & N. 712.

HARRISON, C. J. It is not necessary to reserve our decision. I have had the benefit of reading the judgment of Mr. Justice Gwynne, and of considering the cases therein cited, and also of the present argument.

In a case like this, where we are sitting in appeal, we should not reverse the judgment of the Judge below.

unless it was plainly wrong. We think the learned Judge right.

The only question is, whether an action of trespass will lie under the circumstances which appear. The plaintiff admits a valid judgment, and the existence of a process to enforce it. Unless the process is a nullity, there can be no action of trespass. Here there is nothing more than an irregularity, and an irregularity to be taken advantage of must be moved against.

I offer no opinion as to whether the plaintiff would succeed on such a motion,—it is not necessary.

As the process has not been moved against, and is not a nullity, and as the plaintiff admits the judgment, the application must be dismissed, with costs.

MORRISON, J.—I concur in the views of the learned Chief Justice. I have looked into the matter carefully, and I find it a case of first impression; but I cannot find that trespass will lie.

WILSON, J., was not present during the argument or judgment.

Appeal dismissed, with costs.

HUGHES V. THE CANADA PERMANENT LOAN AND SAVINGS SOCIETY.

Corporation—Employment of clerk—Corporate seal—Verdict of jury, effect of—37 Vic. ch. 7 sec. 33.

A resolution passed by defendants, that the plaintiff be engaged for the society's office as a clerk, "at three months, on trial, at a salary of \$800 per annum."

Held, clearly, not to support a count alleging his employment for a year. *Held*, also, looking at the statutes incorporating defendants, C. S. U. C. ch. 53, 37 Vic. ch. 50, D., the duration and character of plaintiff's employment, and the circumstances of his appointment, as set out below, that the contract, so far as executory, must be under the defendants' corporate seal.

A cheque operates as payment until it has been presented and payment refused. In this case, on the evidence set out below, it was held the plaintiff had received the cheque as payment; and the jury having found otherwise a new trial was granted.

37 Vic. ch. 7 sec. 33—the A. J. Act, 1874—does not empower the Court to enter a nonsuit or verdict except in cases where before the Act the Court would have done so, on leave reserved.

Contra, where the trial is before a Judge without a jury: 33 Vic. ch. 7, sec. 6, O.

DECLARATION. First count: that in consideration that the plaintiff would enter into the service of the defendants for one year from the 1st of September, 1874, as a clerk in their business, at a salary of \$800 per annum, the defendants promised to retain the plaintiff in the capacity and on the terms aforesaid during the year. Breach: that before the expiration of the year the defendants dismissed the plaintiff from the said service.

There were also the common *indebitatus* counts for work done, &c.

Pleas: Non-assumpsit to the first count; never indebted to the second count; and to both counts: that defendants satisfied the plaintiff's claim by drawing and delivering to the plaintiff a bill of exchange, payable to the plaintiff or order on demand commonly called a banker's cheque, dated 21st April, 1875, drawn by the defendants on the Federal Bank of Canada, in the city of Toronto, for \$95.95 on demand. There was also the general plea of payment to the whole declaration.

Issue.

The cause was tried at Toronto, at the last Fall Assizes, before Morrison, J., and a jury.

The plaintiff was called as a witness on his own behalf. It appeared that he was in the employment of the defendants in July, 1874, as an inspector for them in the counties of Simcoe and Grey. He was then receiving \$3 a day and his expenses. He so continued till the end of August. He swore he was then asked by Mr. Mason, the general manager of the defendants, how he would like to come into the office at Toronto : that the plaintiff, said he would take \$800 a year : that Mr. Mason said he would have to see the president of the company, and afterwards told him, the plaintiff, that the company would engage him at \$800 a year, commencing on 7th September, 1874 : that he, plaintiff, then entered in to the employment of defendants, and remained so employed till the 10th of March, 1875, when he was discharged.

The plaintiff called for and put in evidence the minute book of the defendants, containing an entry under date 26th August, 1874. It read as follows :—

“ WEDNESDAY, August 26, 1874.

“ It was ordered, that Mr. O. G. Hughes, appraiser at Elora, be engaged for the society's office for three months, on trial, at a salary of \$800 per annum, and that Joseph R. Davis be taken on trial as junior clerk.”

The plaintiff swore that the minute was not at the time communicated to him : that he understood he was employed for a year : that no communication of any kind as to leaving, was made to him during the first three months of his employment : that at the end of the first or second week, Mr. Mason said he was afraid he, plaintiff, could not get into the ways of the office : that this was all the dissatisfaction he heard expressed during the three months ; that he dated his engagement from 1st September, 1874, when another clerk left, and that when he was discharged he had no settlement of any kind with the defendants.

He, however, admitted that, after his discharge an allowance was promised to him on account of the payment

in advance of a loan made to him by the company : that by mistake the amount of the loan was paid by his solicitors in full : that afterwards Mr. Mason drew a cheque for about \$99, \$33 being the amount of the deduction on the loan, and the balance of the month's salary in dispute : that he took the cheque but never presented it for payment : that he afterwards lost it : that the cheque was made payable to his order and in full of all demands : that at the time he noticed the form of the cheque, but said nothing about it : that he thought it was a trick : that he would have used the cheque had he wanted money badly : that he did not use it, and stopped payment of it after it was lost : and that he had not been employed since his dismissal.

Counsel for the defendants moved for a nonsuit. He submitted, as to the common counts, that the cheque operated as payment until the plaintiff offered back the cheque or an indemnity. He also submitted, as to the first count, that the plaintiff could not recover ; that the contract was executory : that there could not be an implied executory contract against a corporation ; and that there was no proof of any contract binding on the defendants.

Leave was reserved to defendants to move to enter a nonsuit on these objections.

Mr. *Mason*, the manager of defendants, was then called as a witness for the defendants. He swore that in June, 1874, he commenced by employing the plaintiff as a valuator : that the plaintiff then said if there were a vacancy in the office he would like to be employed there : that he offered to enter the office on a three months' trial, and was sure he would give satisfaction : that afterwards he was taken into the office of the defendants on the terms previously mentioned : that the engagement was provisional : that the usual minute of three months' trial was made : that this was the invariable rule of the defendants : that after he was a short time in the office witness doubted if plaintiff was competent for the situation, and mentioned the doubt to him, adverting especially to the fact of his

deafness: that afterwards, and within the three months, he told him not to bring his family to Toronto, that the company would not make the appointment permanent: that the plaintiff made no objection: that witness did not like to dismiss him during the winter months, but distinctly told him that the appointment would not be made permanent, but that he might remain till he saw his way to another place: that in March witness heard the plaintiff was purchasing a house in Toronto, and then thought it was time to terminate the engagement: that the plaintiff then for the first time complained that the defendants were not using him well: that he left: that the next day witness got a cheque ready for him, paying him up to the end of the month: that he did not at the time seem disposed to accept the cheque: that witness told him if he did not accept it the defendants might stand on their rights, and the cheque would not be again offered: that afterwards the plaintiff made a claim for reduction under his mortgage: that the witness offered to allow the reduction if it was accepted in full of all demands: that he said he would see about it and left: that he afterwards returned and said he would accept the reduction and the month's salary in full of all claims; and that the cheque was thereupon prepared for the two amounts, and handed to him.

Mr. *Arthur Mason*, the assistant manager, was called as a witness, and corroborated the evidence of the manager to the effect that the cheque was accepted by plaintiff in full of all demands

Counsel for defendants renewed his objections on the whole case.

The learned Judge left it to the jury to say whether there was a hiring by the year, as contended for by the plaintiff, or whether, as contended for by the defendants, the plaintiff was only taken on trial for three months; and if the latter, to find a verdict for the defendants.

The jury found a verdict for the plaintiff for \$250 damages, saying that this amount included the amount of the cheque.

During Michaelmas Term, November 23, 1875, *C. Robinson*, Q. C., obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside and a verdict entered for the defendants, or a nonsuit, pursuant to leave reserved at the trial, on the ground that the plaintiff shewed no right to recover on either count of the declaration; no contract binding on the defendants on which the plaintiff could recover as an executory contract having been proved, and the plaintiff having been paid or holding the defendants' cheque for all services rendered by him, and all damages claimed by him; or for a new trial on the ground that the verdict is contrary to law, evidence, and the weight of evidence, for the reasons aforesaid, and because the evidence and the weight of evidence shewed that there was no yearly hiring of the plaintiff, and that the plaintiff had accepted the defendants' cheque in full satisfaction of the causes of action sued for; or on the ground of misdirection of the learned Judge, in directing the jury that they might include in their verdict moneys included in the said cheque, and that there was evidence of a yearly hiring of the plaintiff, whereas the cheque under the evidence operated as payment, and there was no evidence of such hiring.

During this term, May 29, 1876, *M. C. Cameron*, Q. C., shewed cause. The resolution of defendants authorized the plaintiff's appointment for a year, but if it did not, as the engagement was continued beyond the three months, so far as the contract was executory an engagement for a year may be inferred from the circumstances and conduct of the parties. He cited *Dempsey v. The City of Toronto*, 6 U. C. R. 1; *Raines v. The Credit Harbour Co.*, 1 U. C. R. 174; *Wood v. Ontario & Quebec R. W. Co.*, 24 C. P. 334; *Maynard v. Gamble*, 13 C. P. 56; *Lilley v. Elwin*, 11 Q. B. 742; *Austin v. Guardians Bethnal Green*, L. R. 9 C. P. 91.

C. Robinson, Q. C., contra. The action must fail for want of a seal so far as it is executory. There can be no presumption of a yearly hiring, as the plaintiff contends, for the defendants could not so contract with the plaintiff

except under seal. He cited *Wingate v. The Enniskillen Oil Refining Co.*, 14 C. P. 379; 37 Vic. ch. 50, sec. 20, D.; *Finlay v. Bristol & Exeter R. W. Co.*, 7 Ex. 409; *Woodfall L. & T.*, 10th ed., 113, note; 2 *Chitty on Contracts*, 11th Am. ed., 1105; *Pearce v. Davis*, 1 Moo. & R. 365.

June 29, 1876. HARRISON, C. J.—First, as to the first count. The plaintiff sues the defendants for a breach of contract. The contract alleged is, that the defendants hired the plaintiff for a year as a clerk, at a salary of \$800. The defendants deny that they made any such contract with the plaintiff, and submit that the plaintiff did not at the trial prove any such contract.

The contract sued upon is an executory contract. Defendants insist that such a contract is not binding upon them unless evidenced by their corporate seal, and that if a resolution of the board of directors be sufficient, there is no resolution shewing such a yearly hiring as alleged.

The defendants are a corporation: Consol. Stat. U. C. ch. 53, sec. 1. As such they are entitled to a corporate seal. The corporate seal is expressly recognized by sec. 8 of 37 Vic. ch. 50, D. By that section the directors are authorized to affix the seal of the society to any document or paper which in their judgment may require the same.

The directors are, by sec. 19 of Consol. Stat. U. C. ch. 53, empowered from time to time, at any of their usual meetings, to appoint such persons as they think proper to be officers of the society, and from time to time to discharge such persons, and appoint others in the room of those who vacate, die, or are discharged. The Act is silent as to the mode of appointment, whether under corporate seal or otherwise.

The general rule, subject to some exceptions to be hereafter noticed, is, that a corporation can only contract under its corporate seal. The seal is required as authenticating the concurrence of the whole body corporate. Every member knows he is bound by the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times.

This was the language of Rolfe, B., in *Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815, 823, and has been recently approved and adopted by Pollock, B., in *Mayor, &c. of Kidderminster v. Hardwick*, L. R. 9 Ex. 13, 24.

The principle governing the exceptions to the general rule are conveniently stated in *Church v. The Imperial Gas Light Co.*, 6 A. & E. 846, 861, by the Court of Queen's Bench, which statement was afterwards adopted by the Court of Exchequer in *Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815, 822, and has very recently been quoted with approbation by Lord Coleridge in *Austin v. Guardians Bethnal Green*, L. R. 9 C. P. 94, and in *Wells v. Mayor, &c. Kingston-upon-Hull*, L. R. 10 C. P. 402; 409. See also *Wingate v. Enniskillen Oil Co.*, 14 C. P. 379.

This principle is thus stated by Rolfe B. in *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815, 822: "Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions."

A further exception (not stated but now well-established) is where the contract has been executed and the corporation have got the benefit of it: *Clark v. Hamilton and Gore Mechanics' Institute*, 12 U. C. R. 178; *Pim v. The Corporation of Ontario*, 9 C. P. 302; *Perry v. Corporation of Ottawa*, 23 U. C. R. 391; *Thornton v. Sandwich Street Plank-road Co.*, 25 U. C. R. 591; *Brown v. The Corporation of the Town of Belleville*, 30 U. C. R. 373. See also *Hamilton and Port Dover R. W. Co. v. The Gore Bank*, 20 Grant, 190; *Brown v. Corporation of the Town of Lindsay*, 35 U. C. R. 509.

A still further exception, not so well established, is the case of a trading corporation, as to which corporation it is said, whether the contract is valid without seal or not, depends not so much upon the magnitude or the insignificance of the subject matter, but upon whether or not

the contract is for a purpose connected with the objects of the corporation: *Church v. The Imperial Gas Co.*, 6 A. & E. 846; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; *S. C. L. R. 4 C. P. 617*. See further, *Dyte v. St. Pancras Board of Guardians*, 27 L. T. N. S. 342; *Wells v. Mayor, &c., of Kingston-upon-Hull*, L. R. 10 C. P. 402.

The question for decision is, whether the present case falls within the general rule, or one of the recognized exceptions.

In *Raines v. Credit Harbour Co.*, 1 U. C. R. 174, it was intimated that a harbour company may hire a clerk or servant to render service in the ordinary business of the corporation without using their corporate seal, but the point was one which neither party thought worth while to argue in the case, and the decision of the Court proceeded on another ground.

In *Dempsey v. The Corporation of the City of Toronto*, 6 U. C. R. 1, the plaintiff, although not appointed weigh-master under the corporate seal of the defendants, was held entitled to recover, but only in respect of the portion of time that he had served before dismissal, in other words, only in respect of so much of the contract as had been executed.

In *Sutton v. The Spectacle Makers' Co.*, 10 L. T. N. S. 411, the plaintiff (a solicitor) was held not entitled to recover the amount of a bill of costs without shewing a retainer under the corporate seal of the defendants.

In *Dyte v. St. Pancras Board of Guardians*, 27 L. T. N. S. 342, the plaintiff, a medical officer appointed by resolution, was held not entitled to recover for an alleged wrongful dismissal in the absence of a contract under the seal of the defendants.

In *Broughton v. The Corporation of Brantford*, 19 C. P. 434, where the appointment was under the seal of the defendants, it was held to be valid, although no by-law authorizing the appointment was proved.

In *Austin v. The Guardians of Bethnal Green*, L. R. 9 C. P. 91, it was held that the seal was necessary for the employment of a clerk to a master of a workhouse.

In *Washburn v. The Canada Car Company*, M. T. 1875, (a) not reported—the most recent decision on the point—this Court approved of and followed *Austin v. The Guardians of Bethnal Green*, L. R. 9 C. P. 91.

In *Wood v. The Ontario and Quebec R. W. Co.*, 24 C. P. 334, in which there was no direct reference to *Austin v. The Guardians of Bethnal Green*, either by counsel or Court, the Court seemed to think that defendants, under their charter, 34 Vic. ch. 48, were empowered to appoint an agent to negotiate for and obtain municipal aid by their resolution not under seal.

It appears to me, looking at the statute under which the defendants are incorporated, the duration and character of the employment of the plaintiff, and the circumstances attending his appointment, that this case does not, under the authorities, fall within any of the well recognized exceptions to the general rule; and therefore, that the contract, so far as executory, must be evidenced by the seal of the defendants: See *Lindley on Partnership*, 3rd ed., vol. i., pp. 366, 367, 368,

But supposing a resolution sufficient, under the authority of *Wood v. The Ontario and Quebec C. W. Co.*, 24 C. P. 334, the resolution proved by the plaintiff as a part of his case in no manner supports the contract alleged in his declaration: See *Dyke v. The St. Pancras Board of Guardians*, 27 L. T. N. S. 342.

The rule should, in my opinion, be made absolute to enter a nonsuit as to the cause of action in the first count alleged.

Then, as to the second count. The plaintiff, under that count, which discloses an executed consideration, is entitled to recover, unless the third or fourth pleas be proved.

The mere receipt of a cheque is not *per se* payment of the amount represented by the cheque: *Everett v. Collins*,

(a) The judgment in this case, having been mislaid, was not handed to the reporter. It was an action similar to the present. The plaintiff, manager of defendants' company, sued on an agreement for a yearly hiring, not under seal, for a wrongful dismissal, and on the common counts for services rendered. The jury found a verdict for the plaintiff on each count. The Court, following *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91, granted a nonsuit as to the first count, allowing the verdict to stand on the common counts.

2 Camp. 515; *Tapley v. Martens*, 8 T. R. 451. See also *Hough v. May*, 4 A. & E. 954. But it operates as payment until it has been presented and payment refused: Per Patteson, J., in *Pearce v. Davis*, 1 Moo. & R. 365. If the holder either receive it as payment and there be funds to answer it, and the holder of it be guilty of laches to the prejudice of the signer of the cheque, it may operate as payment: *Hopkins v. Ware*, L. R. 4 Ex. 268. See further *Chitty on Contracts*, 9 ed., 1105, and *Daniel on Negotiable Securities*, sec. 1623.

The evidence in this case on the part of the defence shews that the cheque was received by the plaintiff as payment. His own testimony is not really inconsistent therewith. His conduct agrees therewith. But the jury, notwithstanding, have found to the contrary. There being a jury, the question was one proper for the consideration of the jury, and could not have been withdrawn from their consideration by the learned Judge who tried the cause. Their finding, however, is contrary to evidence and the weight of evidence.

It is now enacted that every verdict shall be considered by the Court in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of the parties had been expressly given for that purpose: Sec. 33 of 37 Vic. ch. 7, O.

A literal construction of this section would seem to warrant the Court in every case, whether a verdict has been rendered by a jury or by a Judge, to set aside that verdict and enter it for the plaintiff, if the Court should be of opinion that *upon the evidence* the verdict should be for plaintiff, in the same manner as that might have been done formerly where leave was specially reserved for the purpose: Per Hagarty, C. J., in *Bank of British North America v. Simpson*, 24 C. P. 354, 361.

I do not read the section as empowering the Court to enter a nonsuit, or a verdict, in cases *other* than where before the Act the Court on leave reserved would have

entered a nonsuit a verdict: See *Campbell v. Hill*, 23 C. P. 473.

Before the Act, in the event of trial by jury, the Court had no power to enter a nonsuit or verdict, unless leave was reserved at the trial with consent of the parties: *Minchin v. Clement*, 1 B. & Al. 252; *Treacher v. Hinton*, 4 B. & Al. 413; *Rickets v. Burman*, 4 Dowl. 578; *Sutor v. McLean*, 8 C. P. 200.

Since the Act, every verdict shall be considered by the Court in all motions affecting the same, "as if leave had been reserved at the trial."

The only effect of the Act, I take it, is, to empower the Court to enter a verdict or a nonsuit, although there was no leave reserved at the trial, "in like manner as if the assent of the parties had been expressly given for that purpose."

The Act does not, I think, enable the Court entirely to disregard the verdict of a jury on a question of fact properly submitted for their consideration: See *Ex parte Morgan*, L. R. 2 Ch. D. 72.

The verdict or finding of a Judge in this respect by statute stands on a different footing: 33 Vic. ch. 7, sec. 6, O.

There must be a new trial as to the second count, on the ground that the verdict on that count is against evidence: See *Bower v. Hill*, 2 Scott 535, 540; *Earl of Macclesfield v. Bradley*, 7 M. & W. 570; *Elwood v. Cameron*, 17 U. C. R. 528; *Dawson v. Harris*, 11 C. B. N. S. 801; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, 323.

Rule absolute to enter a nonsuit as to the first count, and for a new trial as to the second count, costs of the latter to abide the event.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule accordingly.

DONALD MCGREGOR FERGUSON, AN INFANT, BY ALLEN GRANT, HIS GUARDIAN, v. THE REV. JOHN FERGUSON.

Will—Remoteness—Perpetuity—Estate tail—Limitations.

A testator who died in 1849 devised as follows: "It pleased the Lord to give me two sons equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground and the quarter of an acre for a place of worship." (To Duncan his son, he gave his family Bible and 5s., above what he had done for him). "To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer state dues and public bindings himself and the lawful male offspring of his body until the proper heir come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber of whatever kind away off the land, or bringing any other family on to it but his own. But if he leave a situation so advantageous * * I appoint Peter McVicar, my grandson, to take charge of the place, farm and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions until the heir be of lawful age as aforesaid."

The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation, conveyed his interest to Peter McVicar, named in the will. Neither of the testator's sons had any son born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar.

Held, Wilson, J., dissenting, that Peter Ferguson did not take an estate tail under the doctrine of *cy pres*; and that, the principal devise to the unborn grandson being void for remoteness, the defendant, the heir-at-law, was entitled.

Per *Wilson, J.* The principal devise being void, Peter Ferguson took an estate in tail male; the limitation on such estate, in favour of the great grandson, being inoperative and void could not defeat it; and the plaintiff was entitled under his father by descent, or under his deed from McVicar, to whom his father had conveyed.

THIS was an action of ejectment brought to recover possession of lot 13, in the 10th concession of the township of Drummond, saving and excepting thereout the rear twenty acres of the south-west half thereof, and also four acres thereof heretofore sold for taxes.

The plaintiff claimed title as heir of entail of Peter Ferguson, devisee in tail male under the last will of Peter Ferguson, deceased.

The defendant besides denying the plaintiff's title, asserted title in himself as heir-at-law of Peter Ferguson, defendant's grandfather, who died seized of the land in

1849. The defendant further claimed title by length of possession, and by deed from F. A. Hall, who derived title under Peter McVicar, who derived title as devisee under the will of Peter Ferguson, deceased. He also claimed title to four acres, parcel of the land in the writ mentioned, being the rear four acres of the east half of the lot, by virtue of a deed from F. A. Hall, who derived title thereto under a sale thereof made for arrears of taxes.

The case was tried at Perth at the last Fall Assizes, before Patterson, J., without a jury.

It was admitted that one Peter Ferguson died seized of the land in 1849, and that the defendant was his heir-at-law.

A will of Peter Ferguson was also admitted, the proper interpretation of which was the matter in controversy between the parties.

The portion of the will in question, dated 3rd December, 1845, was as follows:

"Secondly. It pleased the Lord to give me two sons equally dear to my heart, to give them equal justice I leave all my land to the first great grandson, descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance except the burying ground and the quarter of an acre for a place of worship. To Duncan Ferguson, my son, I bequeath my family bible, and five shillings currency over and above what I have done for him, with my blessing and prayer for him that by grace he will be able to make the best use of his portion. To Peter Ferguson my son I bequeath my implements belonging to my farm, and to occupy the farm and answer state dues and public bindings himself and the lawful male offspring of his body until the proper heir come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land or bringing any other family on to it but his own. But if he leaves a situation so advantageous and cannot maintain himself upon it, painful and humbling thought of him failing, but in case of this happening, I appoint Peter McVicar, my grandson, to take charge of the place, farm, and all that pertains to it, and occupy the same for his own benefit and advantage according to the forementioned restrictions and conditions until the heir be of lawful age as aforesaid."

It was admitted at the trial, according to the note of the learned Judge, that the devise by the testator to his first great grandson descended from either of his sons by lawful ordinary generation in the masculine line, was void under the rule against perpetuities. Duncan was the elder son, Peter was the second son, Peter McVicar was the son of a sister.

The land at the time of the testator's death was in the occupation of one Blair, a tenant of the testator, under a lease for ten years from 1st May, 1847.

After the lease to Blair expired, Peter Ferguson, the son of the testator, went into occupation of the land and sowed some crops.

He on 24th August, 1857, made a deed conveying to Peter McVicar, the grandson of the testator, who is named in the will.

This deed was for the expressed consideration of two pounds, and by it Peter Ferguson bargained, sold, and quitted claim to Peter McVicar, his heirs and assigns forever "all his (Peter Ferguson's) right, title, interest, property, claim, and demand, both at law and in equity, and as well in possession as in expectancy, of, in, and to" the land.

The deed, although made and executed on the 24th of August, 1857, was not recorded till 3rd of November, 1858.

The crops which Peter Ferguson had sown on the land in 1857 were sold under execution against him in the fall of that year, and he then left the land and never afterwards occupied it.

When Peter Ferguson left the land in 1857, Alexander McVicar, a brother of Peter McVicar, took possession, apparently under his brother Peter McVicar, although this fact was not directly proved.

Alexander McVicar remained in possession for a year and a half, when Peter McVicar himself went into possession and continued to occupy till recently.

The defendant, besides being the heir-at-law of the testator, proved a deed to himself of the land from Peter McVicar.

Peter Ferguson, junr., having married on the 15th of September, 1860, died in 1864.

The plaintiff, who was the son and only child of Peter Ferguson, junr., and who was born on the 20th of April, 1861, claimed that under the will his father took an estate tail, and that on his father's decease in 1864, the estate descended to him, the plaintiff.

The argument on behalf of the plaintiff was, that the deed to Peter McVicar was inoperative to bar the entail by reason of not granting the land, but only "the interest" of Peter Ferguson, and for want of registration within six months.

The argument on his behalf also was, that the condition or restriction expressed in the will as to the occupation by Peter Ferguson, junr., was void as repugnant to the devise, and as being in restraint of alienation; and that the devise to the great grandson unborn being void, Peter Ferguson, junr., took the estate free from the condition, which was imposed only to preserve the property for the great grandson.

The arguments for the defendant were, that the devise to Peter Ferguson, junr., being merely in aid of the principal devise, and for the purpose of preserving the property, the effect of the principal devise being void was to give the estate at once to the heir-at-law; and that if the devise to Peter Ferguson, junr., ever took effect it was subject to the condition that he should live on the place, and that on his abandoning the place in 1857, the devise over to Peter McVicar took effect; and that the defendant was, therefore, entitled to hold possession either as heir-at-law of the testator or as a grantee of Peter McVicar, the devisee.

The learned Judge entered a verdict for the plaintiff, on the ground that Peter Ferguson, junr., took an estate tail; that the deed to Peter McVicar was inoperative to bar the entail; and that, the ulterior devise failing by reason of the remoteness, the conditions, which pointed only to the preservation of the property for the unborn devisee, failed

with the devise in aid of which they were imposed, leaving the estate tail free from the conditions.

In Michaelmas term, November 18, 1875, *MacLennan*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, pursuant to the Law Reform Amendment Act.

During Hilary term, February 25, 1876, *Bethune* shewed cause. Peter Ferguson, jr., took a *quasi* estate tail under the will on the doctrine of *cy pres*: *Cadell v. Palmer*, Tudor's Leading Cases on Real Property, 2nd ed., 360, 426; *Stackpoole v. Stackpoole*, 4 Dr. & War. 320; *Vanderplank v. King*, 3 Hare 1; *Douglas v. Congreve*, 4 Bing. N. C. 1, S. C. 1 Beav. 59. The words "Peter and the lawful offspring of his body" are equivalent to the words "heirs of his body": 2 *Jarman* on Wills, 3rd ed., p. 388, 394; *Thompson v. Beasley*, 3 Dr. 7; *Jordan v. Lowe*, 6 Beav. 350; *Haddelsey v. Adams*, 22 Beav. 266, 277; *Beaver v. Nowell*, 25 Beav. 551. "The offspring" cannot take as purchasers because not at the time in being: *Jenkins v. Hughes*, 8 H. L. 571; *Key v. Key*, 4 DeG. McN. & G. 73; *Marshall v. Grime*, 28 Beav. 375; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35, 41; *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156; *Kay v. Gould*, 15 U. C. R. 131; *Jardine v. Wilson et al.*, 32 U. C. R. 498; *Re Shaver*, 3 Ch. Chamb. 379. The subsequent conditions as to possession, &c., are void as being in restraint of the estate tail: *Gallinger v. Farlinger et ux.*, 6 C. P. 512; and the estate tail has not been effectually barred: Consol. Stat. U. C. ch. 83, secs. 30, 31.

MacLennan, Q.C., contra. The argument on the other side as to the principal devise is a fallacy. It was conceded at the trial that the title had lapsed, not that the devise was void as against perpetuity. The gift to the great grandson was a present gift. If the great grandson had been living at the time of the death of the testator he would have taken directly: *Lewis* on Perpetuities, 164. As there was no devisee capable of taking at the time of

the death, the devise lapsed. It was not intended to give any estate to Peter Ferguson, junr.; the limitations were because he was to have no estate, and simply to guard and protect the estate for another: *Rabbeth v. Squire*, 19 Beav. 70; *Lockyer v. Savage*, 2 Str. 947. The circumstances were such as entitled Peter McVicar to take possession, and defendant claims to hold under Peter McVicar as well as being heir-at-law of the testator. Besides, being in possession, the exact nature or character of his title is not of much moment; as the plaintiff shews no title to disturb the possession.

June 29, 1876. HARRISON, C. J.—This is an extraordinary will. The principal object of the testator's bounty is, "the first great grandson descended from his sons by lawful ordinary gestation in the masculine line." To him the estate is devised; to him it is to pass free from incumbrances; for him, his son Peter, and the lawful offspring of his body are to occupy, till he "the proper heir" come of age "to take possession."

This view is strengthened by the declaration that Peter Ferguson, junr., and all are prohibited from giving any wood or timber off the land or bringing any other family on it except his own.

Should Peter leave "a situation so advantageous," Peter McVicar, his grandson, is "to take charge of the place, farm, and all that pertains to it," and "occupy the same for his own benefit and advantage," &c., according to the forementioned restrictions and conditions, "until the heir be of lawful age, as aforesaid."

It does not appear to me that the testator intended to confer any estate either on his son Peter or his grandson Peter McVicar, but simply empowered them to occupy free of rent and protect the farm until "the proper heir" came of age to "take possession."

It is argued by the counsel for the plaintiff that the principal devise is void under the rule against perpetuity, and that Peter Ferguson, junr., took an estate tail on the doctrine of *cy pres*.

It is argued by counsel for the defendant that the principal devise lapsed, and as there is no residuary devise, the defendant, as heir-at-law of the testator, is entitled to the land as intestate real estate.

A perpetuity is a future limitation, whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation : *Lewis* on Perpetuity 164.

The limits prescribed to the creation of future estates and interests are the same both at law and in equity. The rule against perpetuity is of equal force, and its provisions are administered with equal strictness in both jurisdictions : *Lewis* on Perpetuity 169.

The necessity for such a rule became apparent as soon as executory limitations were permitted, but no definite period appears at first to have been fixed upon, the Courts being content for a while with defeating various attempts to create perpetuities. But after a while a settled rule was laid down. This is founded on an analogy to the rule of law relating to remainders, which forbids the gift of land to an unborn person for life, followed by an estate to the issue of such unborn person. Under this rule there can be no greater restraint on alienation than that which may be effected by means of a settlement limiting one or more life estates to a person or persons in being, followed by one or more estates tail expectant on the expectation of the preceding estate for life. And since the estate tail can be barred by the tenant in tail as soon as he has attained his majority, the utmost restraint on alienation possible by limitation of remainders is for a life or lives in being and twenty-one years afterwards. The full extent of this period as that within which property might be rendered incapable of alienation, was in the case of execu-

tory limitations at first allowed only where the limitation was to take effect in favour of an infant. But this was afterwards extended to all cases, and it is now clearly settled that every executory limitation is well created, which must either take effect or fail to take effect within the period of a life or lives in being, with an extension of a few months in favour of a limitation to a person who is *en ventre sa mere* at the expiration of the twenty-one years: See *Deane's Principles of Conveyancing*, 213; *Lewis on Perpetuity*, 154; and Mr. *Hargrave's* argument in *Thellusson v. Woodford*, 4 Ves. 227, 248.

In *Cadell v. Palmer*, 1 Cl. & Fin. 372, S. C.; *Tudor's Leading Cases on Real Property*, 2nd ed., 360, 400, it was held by the House of Lords that the limit beyond lives in being is a term in gross of twenty-one years and a few months, the period of gestation where gestation exists.

The period of gestation is added, but that is only in the particular event of gestation happening: Per Lord Brougham in *Lord Dungannon v. Smith*, 12 Cl. & Fin. 546, 629.

The extreme limit beyond which property cannot be rendered unalienable is now a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever, and that a person *en ventre sa mere* is for the purposes of the rule considered as in existence: *Tudor's Leading Cases on Real Property*, 2nd ed., p. 360, 400.

Besides, the law requires that the event on which the estate is to vest *must* happen within the twenty-one years and the period of gestation. It is not sufficient that it *may* vest within that period. It must be good in its creation. Unless created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years, and the period allowed for gestation, it is not valid. Subsequent events cannot make it valid. If infected with the vice of its possibly exceeding the prescribed limit, the devise is altogether void both at law and in equity: See *Ibbetson v. Ibbetson*, 10 Sim. 495, affirmed in 5 M. & C. 26, and approved in *Lord Dungannon v. Smith*,

12 Cl. & Fin. 546, 629. See further *Harrington v. Harrington*, L. R. 5 H. L. 87.

Applying these principles to the will before me, with a knowledge of the facts proved at the trial, I can come to no other conclusion than that the principal devise is void for remoteness: See *Re Brown and Sibly*, Weekly Notes, 27th May, 1876, p. 176.

But whether the principal devise be void for remoteness, as argued by counsel for the plaintiff, or only lapsed, as argued by counsel for the defendant, the really important question which arises is, whether we should hold that Peter Ferguson, junr., the father of the plaintiff, took an estate tail according to the doctrine of *cy pres*, or otherwise.

The doctrine of *cy pres*, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail with cross remainders amongst them.

In such a case the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only with remainder to his children as purchasers, is illegal as tending to a perpetuity.

In such a case the law, in order to prevent the testator's intention from being entirely defeated, has treated his expressed intention as divisible into two parts: first, the intention that the first taker and his issue male or his issue general, as the case may be, shall take in succession according to the legal course of descent; and secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers.

The two intentions being thus ascertained the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention; shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may

be, to the first taker : Per Rolfe, B, in *Monypenny v. Dering et al.*, 16 M. & W. 418, 428. See also *Nicholl v. Nicholl*, 2 W. Bl. 1159 ; *Smith v. Camelford*, 2 Ves. Jr. 698 ; *Ray v. Gould*, 15 U. C. R. 131 ; *Jardine v. Wilson*, 33 U. C. R. 498 ; *Allyn v. Mather*, 9. Conn. 114 ; *Jackson v. Brown*, 13 Wend. 437.

The doctrine may be applied to the execution of a power by a will : *Stackpoole v. Stackpoole*, 4 Dr. & War. 320 ; but it will not be held to apply in any case where its application would be to make the estate devolve in a line of succession different from that which the testator has expressly designated : *Monypenny v. Dering et al.*, 16 M. & W. 418. See further *Jenkins v. Hughes*, 8 H. L. 571. See, however, *Pitt v. Jackson*, 2 Bro. C. C. 51.

The rule being an arbitrary principle of construction, introduced to effect the intention of the testator in the exigency of a particular case, is not to be applied except when the necessity of the case requires it : *Vanderplank v. King*, 3 Hare 1.

The Judges have over and over again said the *cy pres* doctrine ought not to be extended : Per Sir William Romilly in *Hale v. Pew*, 25 Beav. 338.

The result of the rule is, that in order to effect the general intent at the expense of the particular intent, you defeat both by putting the estate in the power of the first taker : *Ib.*

The rule is inapplicable where the devise is to A. (the unborn person) for life, with remainder to his children in fee simple : *Bristow v. Ward*, 2 Ves. Jr. 336. See also *Hale v. Pew*, 25 Beav. 335.

The devise here is not to the great grandson for life, with remainder to the first or other sons of such person in tail male, or with remainder to the first or other sons of such person in tail general ; and if it were, the plaintiff would not be the heir-at-law of the first taker under such a devise.

Should he marry and have a son, that son would be " the great grandson of the testator " descending from one of his

sons "by lawful ordinary gestation in the masculine line," and the first taker under the devise. His heir-at-law might contend that although the devise is void for remoteness, there is a *quasi* estate tail. But a man not married, who may never be a father, is not to be deemed the heir-at-law of a son not yet born, and who never may be born, for the purpose of recovering land that may never vest, and *primâ facie* cannot vest according to the rule against perpetuity.

The only claim, therefore, that can with any appearance of reason be advanced in favour of the plaintiff is under the direct devise to his father, Peter Ferguson, jr., and "the lawful male offspring of his body," to occupy the farm till the proper heir-at-law come of age, subject to the right of Peter McVicar to take charge of the farm in the event of Peter Ferguson, junr., "leaving a situation so advantageous."

The testator by this part of his will only intended, in my opinion, to confer the right to take care of the farm on Peter Ferguson, junr., until such time as his great grandson unborn should be able to take possession.

It is a right subordinate to and incidental to the principal devise, and so ought to stand or fall with the principal devise. Besides, it is a right conditional, and not a right absolute. It is for obvious reasons made subject to personal occupation, and in the event of Peter Ferguson, junr., continuing to occupy and dying in occupation, "the lawful male offspring" of his body are in like manner to occupy till the coming of the expected great grandson: See *Rabbeth v. Squire*, 19 Beav. 70, 76, 77.

Under such a will I am not prepared to hold that there is any estate tail conferred on Peter Ferguson, junr., which would render the condition as to occupation void.

It would be different if an estate tail were plainly given by the will, and there was merely a subsequent condition in restraint of alienation: See *Gallinger v. Farlinger et ux.*, 6 C. P. 512; but see also *Re MacLeay*, L. R. 20 Eq. 186.

To construe this will as contended for by the plaintiff, would be not only to interpret it contrary to the expressed

intention of the testator, but to make for him a will the very reverse of what he plainly intended.

The fact that the principal devise cannot take effect, is no reason why the devise subordinate to and incidental to it should be so read as to make it a substitute for the principal devise, but so far as effect can be legally given to the intention of the testator, that intention should be carried into effect.

In the construction of wills adjudged cases may very properly be argued from if they establish general rules of construction to find out the intention of the testator, which intention ought to prevail if agreeable to the rules of law : Per Lord Mansfield in *Goodtitle v. Whitby*, 1 Burr. 233.

The cases are so numerous, and the distinctions upon them so subtle, that no general rule can be deduced from them beyond this, that it is the duty of the Court, as far as possible, to collect and carry out the intention of the testator : Per Lord Justice Turner in *Key v. Key*, 4 DeG. McN. & G. 73, 86. See further *Waring v. Currey*, 22 W. R. 150.

Where upon a careful perusal of a will it is impossible not to be satisfied that a particular construction would disappoint the intention of the testator, such a construction, unless very clear and free from doubt, ought not to be adopted : See per Lord Justice Knight Bruce in *Key v. Key* 4 DeG. McN. & G. 73. See further *Wadegery v. Handley*, L. R. 1 Ch. D. 653.

You are to construe a will according to the intention of the testator, as it is to be collected from the language and dispositions contained in the will, and you must construe the language according to its simple meaning, provided you are not deterred from so doing by some inconsistency or repugnancy or some palpable absurdity that is the result of following the literal meaning : Per Lord Westbury in *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35, 41.

If a clause in a will is susceptible of two constructions, one of which will support, and the other defeat a testator's intention, there can be no doubt which of the two

ought to be adopted: Per Lord Chelmsford in *Christie v. Gosling*, L. R. 1 H. L. 279, 290.

It seems to me that the condition in this will as to occupation, looking at the testator's intention as apparent from the face of the will, is not to be read as annexed by way of proviso to an estate tail and as cutting down the gift, but as an essential part of the gift itself, so that no person can claim the gift except as being a person or as claiming under a person who holds by fulfilling all the qualifications attached to the gift: See per Lord St. Leonards in *Christie v. Gosling*, L. R. 1 H. L. 279, 295; Per Lord Hatherley in *Harrington v. Harrington*, L. R. 5 H. L. 87, 99. See further *Thomas v. Kelly*, 16 Am. 716.

When Peter Ferguson, junr., abandoned the farm, he in my opinion, according to the expressed intention of the testator, abandoned all right to or interest in the farm, and when he died left nothing as regards the farm that the plaintiff, his son, can be properly said to inherit.

In the event which has happened, the right of Peter McVicar to take charge of the farm has, according to the language of the will, accrued.

The defendant claims title under Peter McVicar.

If it be argued that Peter McVicar had no more right to abandon possession, sell or convey his interest than Peter Ferguson, junr., the answer by the defendant, who is in possession, may be two-fold.

1. That the plaintiff, not being the heir-at-law of the testator, has no right to raise such a question as against the defendant, who is in possession.

2. That if the question be properly raised, the defendant, who is not only in possession but the admitted heir-at-law of the testator if the testator died intestate, is the person in that case entitled to hold the land. See *Doe d. Hearn v. Cameron*, 15 Am. 701.

The rule must, I think, be absolute to enter a verdict for the defendant.

MORRISON, J., concurred.

WILSON, J.—The testator, in order to do justice between the two sons which he had by the gift of the Lord, and who were equally dear to his heart, gave the land, which he had by the will of God, to neither of them. By administering justice in that way he has occasioned this litigation to find out whose land it is.

He has given it to the first great grandson descending from them (his two sons) by lawful ordinary generation in the masculine line, and it is admitted that such a devise is not sustainable.

Peter certainly had no son born in the testator's lifetime. And I presume Duncan had not either.

A devise to the son of an unborn grandson is too remote.

And the like result would follow, in my opinion, even if Duncan had a son living in the lifetime of the testator, because the unborn children of Duncan's son might not be sons. And Peter's unborn son might have a son before Duncan's born son had one. And so by the terms of the will there was an unwarrantable remoteness possible. It is not a lapsed devise to the great grandson, because it never had or could have effect at all. There was no period after the making of the devise, when under any circumstances within the rules of law it could have had operation. It is a void and inoperative devise to the person intended.

The question then is, whether there is a valid devise to Peter, the son of the testator?

He is to occupy the farm and to answer state dues and public burdens, himself and the lawful male offspring of his body, until the proper heir shall come of age to take possession. That devise confers an estate in tail male upon Peter the son. The limitation that such estate is to continue until the proper heir—the great grandson—shall come of age and take possession, is quite useless and inoperative, because the great grandson can never take it.

The testator might as well have limited Peter's estate by the happening of any other remote or improbable contingency.

As Peter, his son, took an estate by the will, if he is to

be deprived of it, it must be because it will be defeated by the force and terms of the conditional limitation referred to. But as such a limitation is void, it cannot defeat a vested estate: ‘ And therefore in all such cases, if the condition be subsequent, the estate * * is absolute, and the condition void ; and if the condition [viz., contingency] be to go before the estate, the estate and the condition both are void [*i.e.*, the gift or limitation is void, and no estate ever arises] ”: *Shep. Touch.* 129.

The rest of the will, relating to Peter's not taking wood or timber from the land, or bringing any other family but his own upon it, which, it is said, is “a situation so advantageous” for him, is not binding, because the law holds it to be not sufficiently advantageous for him, and therefore the devise over to Peter McVicar cannot take effect.

An estate in tail being thus vested by the will in Peter Ferguson, the son, the next question is, whether the plaintiff is entitled to recover it in this action? He is the son and heir male of Peter Ferguson, the son. He also claims through a deed made by his father to Peter McVicar, and by a deed from Peter McVicar to himself, the plaintiff.

It appears the deed made by Peter, the son, was not registered within six months after its execution, according to the Consol. Stat. U. C., ch. 83, sec. 31.

But as the plaintiff is both the heir in tail, and also the grantee now claiming through his father's deed, it is of little consequence in this action whether he recover by force of his title by descent or by virtue of the deed which his father made to Peter McVicar (*a*).

Rule absolute.

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K

(*a*) This case has since been argued in the Court of Appeal, and stands for judgment there.

ADAMS V. LOUGHMAN.

Right of way—When it passes by deed—Unity of possession—Representation.

B., owning land in fee, conveyed a part of it, on which were two houses, to the plaintiff, by a deed under the Act respecting short forms of conveyances, describing the premises as consisting of two houses, numbered 112 and 114, "and the appurtenances thereof," and by metes and bounds also, one of the courses extending westerly "to a lane produced, six feet wide, then south * * along the said lane," &c. This lane then existed over B.'s land, and was used as a means of access to the two houses. The plaintiff claimed title under B. by a subsequent conveyance, and was aware of the description in defendant's deed before he purchased. *Held*, that the right to use the way passed by the deed to defendant.

B., when he sold to defendant, represented that this lane was laid out for the use of the land conveyed, and on the faith of this defendant purchased: *Held*, that even if the right had not passed by the deed, the defendant would have been entitled to relief in equity against interference by B., or any one claiming under him.

THIS was an action of trespass *quare clausam fregit*.

The declaration alleged that the defendant, on divers days and times, broke into and entered certain land of the plaintiff, that is to say, all and singular that certain parcel or tract of land and premises, situate, lying, and being in the city of Toronto, in the county of York, and being composed of all those portions of lots Nos. 3 and 4, on the south side of Queen street, in the city of Toronto, according to plan number 22, A, not heretofore conveyed by George D'Arcy Boulton, of the said city of Toronto, and Juliana Mary Boulton, his wife, to John Loughman, the defendant, by indenture, bearing date the sixth day of February, A.D. 1871; and which said premises thereby conveyed, or intended so to be, may be more particularly known and described as follows, that is to say: commencing at the north-east angle of the said lot No. 4, thence south 16° east along the westerly limit of Church street, 66 feet and 8 inches, to the northerly wall of the roughcast house formerly numbered 114; thence south 74° west parallel to the southerly limit of the aforesaid lots Nos. 3 and 4, and along the northerly face of the northerly wall of the said roughcast house, formerly numbered 114, now

numbered 115, and the said limit produced westerly in all 66 feet and 5 inches; thence south 16° east parallel to Church street 32 feet and 10 inches to the southerly limit of the aforesaid lots 3 and 4, being also the northerly limit of a lane; thence south 74° west, following the said northerly limit of the said lane, 42 feet and 7 inches, more or less, to the south-westerly angle of the said lot No. 3; thence south 16° west, following the westerly limit of the aforesaid lot No. 3, 93 feet and 6 inches, more or less, to the southerly limit of Queen street; thence north 74° east, following the southerly limit of Queen street, 99 feet, more or less, to the place of beginning, containing by admeasurement 7,400 square feet, being the same more or less, and being parts of lots 3 and 4 on the south side of Queen street, according to a plan of survey executed by Robert Lynn, P. L. S., dated September, 1836, and filed in the registry office for the said city as plan 22 A.

Pleas. 1. Not guilty.

2. That at the time of the alleged trespasses defendant was seized of a certain store, being part of the said lots 3 and 4 in the declaration mentioned, and long before the alleged trespasses, by a deed made between the then owner of the said land, (now of the plaintiff,) and the defendant, George D'Arcy Boulton, then being seized thereof in fee, granted to the said defendant, and to his heirs and assigns, a way on foot and with cattle, from a certain public lane or highway, over the said close of the plaintiff, six feet in width along the said land of the defendant, and as a means of ingress and egress to and from the same, and to from the said highway, at all times of the year, for the more convenient occupation of the said close of the defendant, by virtue of which said grant the defendant, at the time of the alleged trespasses, was entitled to such way as aforesaid; and the alleged trespasses were the removal of an obstruction put across the said way, and the use of the said way by the defendant.

3. On equitable grounds. That George D'Arcy Boulton in the declaration mentioned was seized in fee of the land of the plaintiff and of certain other land, being part of the

said lots 3 and 4 on the south side of Queen street in the declaration mentioned, and being so seized in fee, he, the said George D'Arcy Boulton, by deed granted and conveyed the said last mentioned land to the plaintiff, together with all ways and appurtenances thereto belonging; and at the time of the said grant and conveyance there was a certain way or lane six feet in width running north from a certain public highway bounding the said lots 3 and 4 on the south, along the west boundary of the part of the said lots conveyed by the said Boulton to the defendant, as appurtenant to and for the more easy and convenient access thereto and enjoyment thereof; and after the said grant and conveyance to the defendant, the said George D'Arcy Boulton granted and conveyed the land in the declaration mentioned to the plaintiff, and the plaintiff took and received the said conveyance with notice of the said grant and conveyance from the said Boulton to the defendant; and the alleged trespasses were the removing of an obstruction put across the said lane or way, and the use of the said lane by the defendant as such a way as aforesaid for ingress and egress to and from the said close of the defendant to and from the said highway.

Issue.

The cause was tried at the last Fall Assizes for the city of Toronto, before Burton, J., without a jury.

The plaintiff proved title under deed, dated 13th April, 1874, from the executors and trustees under the last will of Sophia Furlong, deceased, who claimed title under George D'Arcy Boulton, of the land described in the declaration.

The plaintiff was called as a witness, and proved the trespass, which was as alleged in the second and third pleas, the removal by the defendant of the obstruction placed by the plaintiff on the alleged line after he obtained title.

The plaintiff admitted, on cross-examination, that before he purchased he had seen and was aware of the description in the defendant's deed from George D'Arcy Boulton, dated 6th February, 1871.

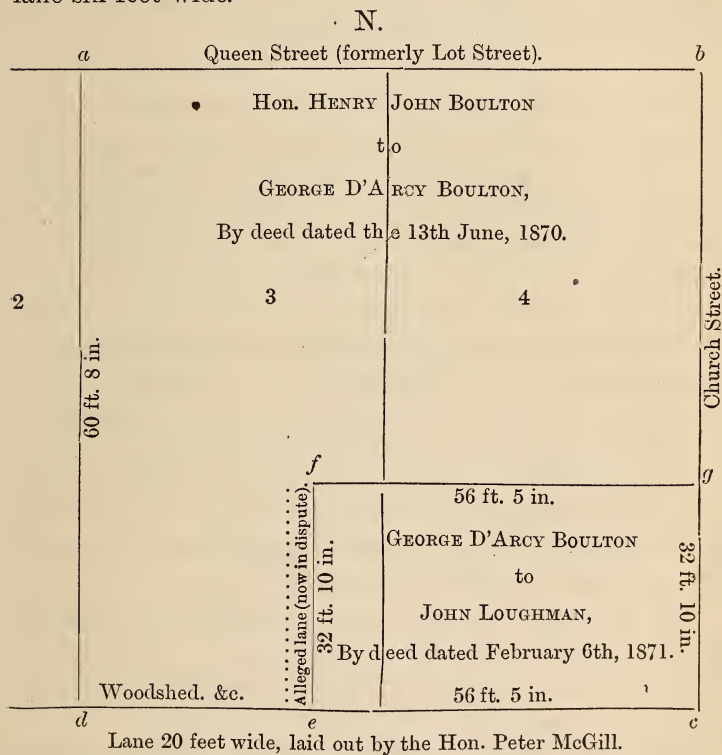
The latter deed, which was made in pursuance of the Act respecting short forms of conveyances and duly registered, described the defendant's land as follows :

" All and singular that certain parcel or tract of land and premises situate, lying, and being in the city of Toronto, * * containing by admeasurement 1,852 square feet, be the same more or less, being composed of two rough-cast houses, numbered 112 and 114, and the appurtenances thereof, being the southerly parts of lots Nos. 3 and 4 on the south side of Queen street, according to a plan or survey executed by Robert Lynn, P. L. S., dated September, 1836, and filed in the registry office of the said city of Toronto as plan 22 A.; and which said parcel or tract of land may be more particularly known and described as follows, that is to say: commencing at the south-east angle of the said lot No. 4, thence north 16° west along the westerly limit of Church street, 32 feet 10 inches, to the northerly face of the northerly wall of the rough-cast house numbered 114; thence south 74° west parallel to the southerly limit of the said lots 3 and 4, and along the northerly face of the northerly wall of the said rough-cast house numbered 114, and the said line produced, westerly, 56 feet 5 inches to a lane, produced, 6 feet wide; thence south 16° east parallel to Church street, along the said lane, 32 feet 10 inches, to the southerly limit of the aforesaid lots 3 and 4 and the northerly limit of a lane; thence north 74° east, following the northerly limit of the said lane, 56 feet 5 inches, to the place of beginning."

The property in dispute, including the alleged lane, is shewn in the plan on the following page.

Persons who had been tenants of Mr. Boulton of one of the rough-cast houses, being the most northerly one, before Loughman bought, stated that there was a lane in rear from the McGill lane, covered in part by a sort of shed roof, and that there were no means of getting to this yard except from the lane; and that this was with the permission of Mr. Boulton, the then owner.

The defendant was also called as a witness on his own behalf. He bought the property in 1870. The two houses were then on it; and there was then a lane in the rear 8 feet wide. The deed to him was first prepared without any reference to the lane, and he refused to carry out the purchase. Mr. Boulton then said to him, "Would not a lane six feet wide answer the purpose?" and to this he agreed. The description in the deed was then altered to read to a lane six feet wide.



(a, b, c, d.) The parcel of land conveyed by Hon. Henry J. Boulton to George D'Arcy Boulton.

(c, e, f, g.) The parcel of land conveyed by George D'Arcy Boulton to John Loughman.

The surveyor who drew the description for the deed and prepared a plan of the property was called as a witness. He said the lane in question was marked on his plan, and he supposed it to be a lane, and that it was used as a necessary means of access to the houses purchased by defendant. He made the plan as he found the premises. The lane was then fenced on both sides and ran back nearly 40 feet from the McGill lane. The plan was not registered.

The learned Judge found in favour of the third plea, and so rendered his verdict for the defendant.

During Hilary term February 11, 1876; *Beaty*, Q. C., obtained a rule, calling on the defendant to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, and on the ground that no right of way passed under the word "appurtenances" in the deed to the defendant, nor did any right of way pass under the words "to a lane six feet wide," there being a unity of possession and ownership prior to the conveyance to the defendant, and all right of way, if any existed, being thereby extinguished; and on the ground that the said words were merely descriptive and did not amount to an independent grant, there being no way legally laid out or any plan filed in the registry office shewing a right of way; and on grounds disclosed in the evidence.

May 31, 1876. *M. C. Cameron*, Q. C., shewed cause. He cited Consol. Stat. U. C. ch. 91, sec. 3; *Kooystra v. Lucas*, 5 B. & Al. 830; *Skull v. Glenister*, 16 C. B. S. 81; *Langley v. Hammond*, L. R. 3 Ex. 161.

Beaty, Q. C., contra, cited *Harding v. Wilson*, 2 B. & C. 96; *Woolrych* on Ways, 2nd ed., 24, 26; *Polden v. Bastard*, 4 B. & S. 258; *Goddard* on Easements, 73.

June 29, 1876. HARRISON, C. J.—The deed to the defendant is expressed to be made in pursuance of the "Act respecting short forms of conveyances": Consol. Stat. U. C. ch. 91.

The third section of that Act declares that "Every such deed, unless an exception be specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, *ways*, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and *appurtenances whatsoever*, to the lands therein comprised, *belonging or in any wise appertaining*, or *with the same demised, held, used, occupied and enjoyed*, or taken or known as part or parcel thereof," &c.

So far from any exception being made in the deed in question, we find the conveyances to be of the two rough-cast houses Nos. 112 and 114, "and the appurtenances thereof," and the land described as extending on the west "to a lane six feet wide;" and then running south 16° east along "the said lane" 32 feet 10 inches to the southerly limit, &c.

Before the deed was executed the lane had been held, used, occupied, and enjoyed with the houses as appurtenant thereto.

The question is, whether the effect of the deed, read with the aid of sec. 3 of Consol. Stat. U. C. ch. 91, is to pass the right to use the lane, as appurtenant to the houses conveyed, so as to prevent the grantor or any one claiming under him interfering with its enjoyment by the owners or occupiers of the houses conveyed or either of them.

There are many cases which have some bearing on the point, and they are not easily reconciled.

I had occasion not long since in *Harris v. Smith* (a), to consider most of them and other similar cases.

The case of *Harding v. Wilson*, 2 B. & C. 96, relied upon by the plaintiff's counsel, is inapplicable. The lease in that case described the demised premises as abutting on "an *intended* way of 30 feet wide." There was no *actual* way at the time of the demise. It was held that an expression of an intention to construct a way 30 feet wide does not

(a) Not yet reported.

amount to a grant, express or implied, of a way 30 feet wide. Besides, it was held not to be such a way as to pass from the lessee by the words "all ways thereunto appertaining.

And per Holroyd, J., p. 100: "The road in question being over the soil of, the original lessor would not pass by those words. Leases generally contain the words '*heretofore used*,' by which *such a way* would pass. But in the absence of them, or any other words to the like effect, the underlease would confer nothing more than a convenient way."

The way in the case now before us was an actual way before and at the time of the execution of the deed to the defendant, though previously to the deed of greater width than six feet. The deed describes it as a lane six feet wide, and the deed, under sec. 3 of Consol. Stat. U. C. ch. 91, operates as a grant not only of all appurtenances to the land belonging, but expressly of all ways with the same "held, used, occupied, and enjoyed."

In *Kooystra v. Lucas et al.*, 5 B. & Al. 830, 834, the demise, which was of certain land, described, "together with all ways with the said premises, or any part thereof, used or enjoyed," was held to operate as a grant of a right of way then in use.

And per Holroyd, J.: "By the lease, certain premises delineated on a plan on the margin thereof, comprising a part of Sprang's dairy, were demised to the plaintiff, 'together with all ways thereto belonging or appertaining, or therewith, or *with any part thereof used or enjoyed*.' The way in question was a way used and enjoyed with a part of the demised premises. It therefore passed to the plaintiff *by the very words of the lease*."

In modern deeds the words "therewith used and enjoyed," are inserted because conveyancers doubt if the words "appertaining and belonging" or "appurtenances" are *per se* sufficient to operate as a grant of a right to use a way: See *Barlow v. Rhodes*, 1 Cr. & M. 439.

Under the word "appurtenances," according to its legal sense, an easement which does not exist in point of law by

reason of unity of ownership, does not pass: *Plant v. James*, 5 B. & Ad. 791; *Baird v. Fortune*, 7 Jur. N. S. 926.

Where the grantor, however, wishes to create such a right, he may not only do so by express words, but by the words "therewith used and enjoyed," in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee: Per Lord Denman, in *Plant v. James*, 5 B. & Ad. 791, 794.

Where on the face of the deed a manifest intention appears to create a right of way, and there be words of any kind from which that intention may be inferred, or from which it may be inferred that the word "appurtenances" is used in a sense larger than its ordinary meaning, effect will be given to the intention: *Morris v. Edgington*, 3 Taunt. 24; *James v. Plant*, 4 A. & E. 749; *South Metropolitan Cemetery Co. v. Eden*, 16 C. B. 42; *Worthington v. Simson*, 2 E. & E. 618.

Upon the severance of a heritage, a grant will be implied, *first*, of all those continuous and apparent easements which have in fact been used by the owner during the unity and which are necessary to the use of the tenement conveyed, though they have no legal existence as easements; and *secondly*, of all those easements without which the enjoyment of the several portions could not be had at all: *Pyer v. Carter*, 1 H. & N. 916; *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Suffield v. Brown*, 9 Jur. N. S. 999; S. C. 10 Jur. N. S. 111; *Dodd v. Birchall*, 8 Jur. N. S. 1180; S. C. 1 H. & C. 113; *Crossley et al. v. Lightowler*, L. R. 2 Ch. 478; *Watts v. Kelson*, L. R. 6 Ch. 166; *Gale on Easements*, 5th ed., 94.

In *Thompson v. Waterlow*, L. R. 6 Eq. 36, 41, Lord Romilly, while recognizing the authority of *Plant v. James*, attempted to draw a distinction between the user of a way which has been made by the owner of adjoining closes and a right of way which previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties; and so held that where

the owner of two adjoining closes, A. and B., who had during the unity of possession made and used for his own convenience a way across B. to A., executed a conveyance of A. to a purchaser with the general words, "together with all ways, &c., easements and appurtenances thereto belonging, and with the same now or heretofore occupied or enjoyed," that as there was no roadway over B. to A. before the unity of possession, the right to use it did not pass under the general words of the conveyance.

And this distinction was approved by the majority of the Court in *Langley et al. v. Hammond*, L. R. 3 Ex. 161.

But Baron Bramwell, with his usual sagacity, said, p. 170: "I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could *not* pass under such words as used here, ('together with all ways, &c., therewith now used, occupied and enjoyed'), even although there had always been unity of ownership and of possession. And should the case arise, I should like for time to consider before I assented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house, I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is, that here there is here really no defined road."

In *Watts v Kelson*, L. R. 6 Ch. 166, the Lords Justices were of the same mind as Baron Bramwell. Lord Justice Mellish, although pressed with the decisions in *Thompson v. Waterlow* and *Langley v. Hammond*, said, p. 172, "When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man

construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use *that* road would not pass if he sold the house separately from the field."

In the very recent case of *Kay v. Oxley*, L. R. 10 Q. B. 360, where the way had been laid out by the owner of both tenements and the conveyance of one used the words, "together with all * * ways, * * easements, and appurtenances to the said dwelling house, cottage, and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto," it was held that the right to use the way passed to the plaintiff under the above words.

Lush, J., in delivering judgment, said, p. 370, "I do not think that we are at all acting in conflict with the decision of the late Master of the Rolls in *Thomson v. Waterlow*, L. R. 6 Eq. 36. That case is obscurely stated, but I collect from the terms of the judgment that there had been no *specific defined portion of the soil* appropriated by the owner as a roadway to the severed property as appurtenant to it, but that he had been used to ride across one field in *any* direction he thought proper in order to get to another field. As to the case in the Exchequer of *Langley et al. v. Hammond*, L. R. 3 Ex. 161, I think that case is rightly decided, although not upon the ground put by the Lord Chief Baron. I prefer the ground on which my brother Bramwell puts it."

Blackburn, J., who was equally emphatic in condemning the doctrine supposed to be laid down in *Thompson v. Waterlow*, and *Langley et al. v. Hammond*, said, p. 365, "If there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seizin, prevents its being enjoyed as appurtenant."

The weight of authority is in favour of holding, under such general words as here used, or rather intended to be used, under the operation of sec. 3 of Consol. Stat. U. C. ch. 91, that a right to use the then known and defined lane, described in the deed as six feet wide, was granted by the deed; and there can be no doubt on the evidence, if one may look beyond the deed to what took place at the time the deed was executed, that such was the intention of the parties.

It is almost always necessary that the Court should be informed of the surrounding circumstances under which a deed is executed: Per Erle, C. J., in *Skull v. Glenister*, 16 C. B. N. S. 81, 100. But without reference to them, I think the intention is sufficiently apparent on the face of the deed, and so thinking, am of opinion that the defendant has established a perfectly good legal defence to the action.

The case of *Rossin v. Walker*, 6 Grant 619, is an authority to shew that the defendant in this case would be entitled to relief in equity, if we had come to the conclusion that there was no grant of the right to use the lane.

The representation by Mr. Boulton, under whom the plaintiff claims, that the land in dispute was laid out as a lane for the use of the land conveyed to the defendant, and on the faith of which defendant purchased, was, according to that case, sufficient to entitle defendant in equity to an injunction against interference with that right either on the part of Mr. Boulton or of any one claiming under him.

The plaintiff, when he purchased, had notice of the defendant's deed, and cannot complain of the effect which we give that deed either at law or in equity.

The rule *nisi* must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

REGINA V. GOLDING.

Coroner's inquisition—Uncertainty—Other objections.

A coroner's inquisition on the body of P. M. found that S. G. on, &c., at, &c., "did feloniously and maliciously kill and slay one P. M., against the peace of our lady the Queen, her crown and dignity, in self defence of him, the said S. G., without malice or intent to kill."

Held, that it must be quashed, on the application of S. G., as not disclosing with certainty any criminal offence on his part.

Semble, that it was also a fatal objection that twelve jurors did not concur in the finding.

The Christian and surnames of all the jurors need not be appended to the inquisition where they are given in the body of it.

DURING Michaelmas term, November 30, 1875, *Burdett*, as counsel for one Golding, obtained a rule, upon reading the writ of *certiorari* the return and schedule thereto annexed, including the original inquisition, the warrant for the arrest and recognizance for bail, thereunder calling on the Attorney-General for the Province of Ontario to shew cause why the inquisition, warrant of commitment, and recognizance of bail should not be quashed, on the following grounds:—

1. That by said inquisition Golding was acquitted of the charge of manslaughter for which he was committed to gaol.

2. That said inquisition was only signed and agreed to by eight jurors.

3. That no offence is charged or shewn by the said inquisition.

4. That said inquisition is an acquittal in fact and in law.

5. That the same was not on parchment or indented.

6. That the allegations in the same are not certain or single.

- 7 That the jury do not appear to have been good and lawful men of the county, in respect of which the coroner professed or was entitled to act, &c.

8. That said inquisition does not state with certainty when Peter Martin died.

9. That the inquisition is not signed by the jurors mentioned therein.

The inquisition, which was indented though not on parchment, was as follows :—

Province of Ontario, } An inquisition indented and taken
County of Hastings. } for our Sovereign Lady the Queen
To wit : } at the town hall in the township of
Madoc, in the county of Hastings, on the third day of November, in the thirty-ninth year of the reign of our Sovereign lady the Queen, before Henry Hugh Hutton, Esquire, one of the coroners of our said Lady the Queen for the said county, on view of the body of Peter Martin then and there lying dead, upon the oath of (then followed the Christian and surnames of fifteen jurors in words at length) good and lawful men of the said county duly chosen, who being then and there duly sworn and charged to enquire for our said lady the Queen when, how, and by what means the said Peter Martin came to his death, do upon their oaths say, that Sanger Golding on the second day of November in the year aforesaid, at the township of Madoc, in the county of Hastings, did *feloniously and maliciously* kill and slay *one* Peter Martin against the peace of our lady the Queen, her crown and dignity, in *self defence* of him the said Sanger Golding, *without malice or intent to kill*.

In witness whereof as well the said coroner as the jurors aforesaid have hereunto set and subscribed their hands and seals the day and year first above written.

HENRY H. SUTTON,

Coroner. [L. S.]

JOHN DALE, Foreman. [L. S.]

Followed by the signatures and seals of only seven other jurors, with the Christian and surname of most of them at length.

During this term, May 17, 1876, *Burdett* moved the rule absolute. He cited *Regina v. Breden*, 16 U. C. R. 487 : *Re Carmichael*, 10 U. C. L. J. 325 ; *Boys on Coroners*, 131, 167, 168, 169.

No cause was shewn.

June 29, 1876. HARRISON, C. J.—In cases where a coroner has authority the proceedings are in substance the same as before a grand jury, and all the requisites of the indictment are the same; the accusation by the coroner's

jury is equally an accusation by the grand jury, which is the result of their opinion on the evidence adduced before them, and upon which a person may be tried as that of the grand jury, and the judgment upon the one is like the judgment upon the other. Per Blackburn, J., in *Regina v. Ingham*, 5 B. & S. 257, 275.

The word "indictment" as used in the 32-33 Vic. ch. 29, D., respecting procedure in criminal cases, is by sec. 1, sub-sec. 1, made to be understood and to include an information, inquisition, and presentment, as well as an indictment.

The English statute 24 & 25 Vic. ch. 100, which enacted that "in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused" was held to apply to a coroner's inquisition: *Regina v. Ingham*, 5 B & S. 257.

It is not now necessary that any indictment, or any record or document relative to any criminal case, be written on parchment, 32-33 Vic. ch. 29 sec. 13, D.

It sufficiently appears that the jurors were good and lawful men of the county in respect of which the coroner professed to act.

The Christian and surnames of all the jurors are not appended to the inquisition, but this does not appear to be necessary where the Christian and surnames are given, as here, in the body of the inquisition: *Rex v. Evett*, 6 B. & C. 247.

This disposes of three of the objections taken to the inquisition.

The remaining objections relate principally to the effect that the inquisition does not on the face of it disclose any criminal offence against the applicant, but rather the contrary.

The proper course for a party disputing the validity of an inquisition for defects on its face is to demur thereto. The practice, however, of quashing a coroner's inquisition

for defects on its face has prevailed for more than a century: *Regina v. Brownlow*, 11 A. & E. 119. But the Court will not in general entertain an application to quash a coroner's inquisition except for defects on its face: *Re Casey et al.*, 3 Ir. C. L. R. 22; *Regina v. McIntosh*, 7 W. R. 52; S. C., 32 L. T. 146. But see *Regina v. Carter*, 34 L. T. N. S. 849.

The insufficiency of the evidence to support the finding is no proper ground for an application to quash a coroner's inquisition: *Re Casey*, 3 Ir. C. L. R. 22; *Re Millar*, 15 U. C. R. 244; *Regina v. Ingham*, 5 B. & S. 257. Nor is it any ground that evidence not upon oath was received: *Regina v. Ingham*, 5 B. & S. 257; or that the direction of the coroner to the jury was improper: *Ib.*

But where the facts are stated on the face of the inquisition, and the finding is not in law warranted by the facts so stated, the inquisition may be quashed: *Re Culley*, 5 B. & Ad. 230.

Where the inquisition in effect alleged that the slaying was justifiable because certain other persons had either acted improperly or been guilty of neglect, the inquisition was quashed on the application of the Crown: *Re Culley*, 5 B. & Ad. 230.

Where the principal was not distinctly charged either with murder or manslaughter, and others were charged as aiding in "the murder aforesaid" the inquisition was quashed: *Regina v. Breden*, 16 U. C. R. 487.

A warrant reciting a coroner's inquisition and stating the offence as follows, that J. C. "stands charged with having inflicted blows on the body of the said D. F," but not shewing the place where the blows, if any, were inflicted, or the offence, if any, was committed, &c., was held to be void: *Re Carmichael*, 10 U. C. L. J. 325.

The inquisition moved against shews that the enquiry was as to the death of one Peter Martin, but it does not allege that the applicant did kill and slay "the said Peter Martin," but "one Peter Martin," and such killing and slaying, assuming it to have been of the said Peter Martin, is alleged in one part of the inquisition to have

been "feloniously and maliciously," and in a subsequent part to have been "in self-defence," and "without malice or intent to kill."

It is impossible, consistently with the idea of crime, to give any effect to such a strange jumble of words. So far as they can be said to have any meaning they are contradictory. They cannot with certainty describe murder, manslaughter, or any other offence known to the law.

The inquisition must be quashed, on the ground that it does not with any certainty disclose any criminal offence.

It would also appear the objection that twelve jurors did not agree in the finding, even if the finding were in other respects good is a fatal objection to the inquisition; but it is not necessary to decide this point. See *Jervis on Coroners*, 3rd ed., 253, referring to *Cobat's Case*, 2 Hale P. C. 161 *n*.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule absolute.

EDWARDS ET AL. V. THE OTTAWA RIVER NAVIGATION
COMPANY.

*Action for negligence—Evidence of negligence on other occasions—
Admissibility of.*

Action against the defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiffs' lumber and mills there were burned. The alleged negligence consisted in leaving the screens of the steamer open; and on the part of the plaintiffs, evidence was received, though objected to, that on other occasions, at different times and places, the screens were open, and cinders had escaped. The engineer and firemen on the boat, being afterwards called for the defendants, swore that the screens were closed, and had never on any occasion been left open. The learned Judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of the defendants' witnesses.

Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted; and the jury having found for the plaintiffs, a new trial was granted without costs.

THIS was an action brought for the recovery of damages for the destruction of the plaintiffs' property by fire through the alleged negligence of the defendants.

The declaration alleged that the plaintiffs were the owners of certain saw mills upon their lands adjoining the Ottawa river: that they had constructed a wharf along the bank of the said river, opposite to their said lands, for the purpose of shipping their lumber and landing freight and passengers near their said mills: that they were possessed of a large quantity of sawn lumber, which they had cut at their said mills and piled at and upon the said lands and wharf: that the defendants were possessed of a certain steamboat called the Peerless, containing fire and burning matter, which was used by the defendants for the purpose of carrying freight and passengers along the said Ottawa river, and which was being navigated and worked by and under the management of the defendants' officers and servants: that the defendants, while so navigating the said steam vessel as aforesaid, stopped the same at the said wharf; for the purpose of landing freight and passengers, and then navigated the said vessel away from the said

wharf; and while the said steam vessel was near the said wharf the defendants so negligently and unskilfully managed the said steam vessel and the fires and burning matter therein contained, and the said steam vessel was so insufficiently and improperly constructed, that sparks from the said fire and portions of the burning matter escaped and flew from the said steam vessel in and upon the said piles of lumber and ignited the said lumber, whereby the whole of the said lumber was burned, the said mills were set on fire, and, together with certain plant, tools, and stock in trade of the plaintiffs, then being in and near the said mills of the plaintiffs, were burned, &c.; and the plaintiffs were prevented from carrying on their business.

The damages claimed were \$250,000.

Plea, not guilty. Issue.

The cause was tried at the last Fall Assizes at Ottawa, before Patterson, J., and a jury.

The fire occurred on the afternoon of the 14th June, 1875. Immediately before the fire was first observed, the steamboat Peerless, owned by the defendants, called at the wharf. The boat came up the river Ottawa and touched at the wharf for a few minutes to land and receive passengers. There was a strong wind at the time blowing from the steamboat in the direction of the plaintiffs' premises. The fire first appeared in a pile of lumber. Efforts were made to extinguish it, but without success, and it spread rapidly from pile to pile of lumber on the wharf, which at that time was uncovered. In less than half an hour all the lumber on the section of the wharf where the fire commenced was destroyed by the fire. The fire extended to the mill of the plaintiffs in little more than half an hour after it began. The fire worked for a time against the wind. It burnt most fiercely, and in the course of a couple of hours destroyed property belonging to the plaintiffs valued at between \$200,000 and \$300,000.

There was evidence on the part of the plaintiffs to shew that at least one of the screens in one of the funnels of the steamer was open when the steamer touched at the wharf.

One of the passengers swore that the boat struck heavily against the wharf, and that when she struck a rush of cinders proceeded from the smoke stack in the direction of the lumber. Another passenger swore to have been himself struck by a cinder when four or five acres below the plaintiffs' wharf. He also, on the same occasion, said he saw several other cinders. Another passenger swore to having seen cinders fall from the steamer into the river just as the steamer left the plaintiffs' wharf.

Besides, there was evidence on the part of the plaintiffs that the screens of defendants' steamboat were open, and that cinders had been seen to come from the defendants' steamboat at the same wharf on other days, and at other places on the same and other days.

The first witness who gave evidence of this description was Mr. Edwards, one of the plaintiffs.

J. H. Cameron, Q. C., counsel for defendants, said that he from the first objected and continuously objected to the admissibility of such evidence, and did so in the case of Mr. Edwards. The learned Judge had made no note of the objection against the testimony of Mr. Edwards. The first note of any such objection was in the case of Thomas Cole, the nineteenth witness on the part of the plaintiff. The objection there noted was as follows: "*J. H. Cameron* objects now formally that evidence of keeping the screens open after the fire is not admissible. *Bethune* is not desirous of pressing it now, but argues that the evidence is admissible as going to shew the way the boat was habitually managed. In order to avoid detaining the witnesses, the evidence is now taken *de bene esse* without a ruling at present on its admissibility."

Afterwards objections were specifically noted against the testimony of particular witnesses. Thus in the case of Mrs. Charlotte St. Louis. She swore that she caught fire herself in the summer of 1874 from the Peerless on plaintiffs' wharf, and when the boat left the wharf sparks fell on the sleeve of her dress, &c. Objected to.

So in the case of Antoine Melanger, who was called to corroborate the preceding witness.

Evidence was then given shewing that there were strict regulations on the wharf against smoking: that there was no smoking on the wharf: and other evidence negating any other cause than the negligence of defendants.

Evidence was then given as to the value of the property destroyed by the fire, and the case for the plaintiffs closed.

When the case for the plaintiffs was closed *J. H. Cameron*, Q. C., moved for a nonsuit on the grounds that:

1. No case of negligence was proved: there was no evidence of negligence—no evidence of a specific character that the fire arose from sparks coming from the boat—no evidence of improper management—no evidence of improper construction.

2. The plaintiffs were guilty of contributory negligence: *a*, because the pile in which the fire was first discovered was not covered: *b*, in the position of the wharf, and the peculiar combustibility of the materials there, and in having no appliances to put out the fire.

3 As to damages: that as to the mill property and buildings the damages were too remote.

The learned Judge said he thought there was evidence that screens were necessary, and that they were open.

Mr. Cameron then contended that even the fact of the screens being open was not evidence of negligence.

The learned Judge ruled that the fact of the lumber pile being uncovered was for the jury. He was against the point as to remoteness of damages in regard to the mill and buildings, but decided to ask the jury to assess the damages for the mill, &c., separately from the lumber.

Witnesses were then called for the defence.

The engineer of the Peerless swore that neither the damper nor the screens of the steamboat were open on approaching the wharf, while at the wharf, or when leaving. He also swore that he never omitted to close them on any occasion during the three seasons that he had been on the boat.

The assistant engineer gave similar testimony; so did one of the firemen and others.

It was sworn that sufficient steam was always raised on approaching the wharf to enable the steamboat to leave the wharf without either opening the dampers or the screens.

It was also proved the screens were of the best character: that the mesh was a quarter of an inch, which is as small as they are usually made for steamboats: that if smaller they would too much obstruct the draft: that the escape of sparks cannot be altogether prevented with the smallest mesh made for steamboats: and that if the dampers and screens were closed no sparks likely to injure property could escape; and that the screens, after the fire, were examined and found as good as new. Similar evidence was given as to the dampers.

There was some evidence on the part of the defence to shew that on the day of the fire, and about the time of the arrival of the steamboat, a man was seen smoking on the wharf, contrary to the regulations for the safety of the wharf.

This closed the evidence for the defence.

Mr. *Cameron* then renewed his motion for a nonsuit, and his objection to the evidence of what was observed as to the screens being open on occasions after the fire

The learned Judge then ruled that the evidence was admissible, particularly as touching the credit of the engineer of the Peerless and his assistant, who swore that they never neglected to close the screens on approaching a wharf.

The learned Judge left the following questions to the jury:—

1. Was the fire caused by fire communicated from the steamboat?
2. Was it by negligence of those managing the boat that the fire was allowed to escape?
3. Was there contributory negligence on the part of the plaintiffs?

He charged the jury that the first question was one of simple fact: that the evidence did not shew directly that fire passed from the boat to the pile of lumber: that it was a matter to be decided by inference from the evidence

that the fire occurred immediately after the vessel had been at the wharf, that the wind was blowing in the direction of the piles of lumber, and the evidence given to shew that there was or was not any other way to account for the fire.

He told the jury that the defendants were not chargeable with negligence merely by reason of the escape of sparks from the funnels of the steamboat, if they used such precautions as without preventing the proper working of the vessel could be adopted to prevent the escape of fire : that the evidence given by the defendants, and not contradicted, was, that the screens in the funnels were of the best construction and in good order, and the same of the dampers of the furnace, so that no negligence or deficiency in the construction of the boat or appliances was shewn, and that if negligence were established it could only be in the working of the boat.

He pointed out to the jury that there was evidence on the plaintiffs' part, sufficient to go to the jury as evidence, that when at the wharf, or while leaving it, and before having passed the wharf, though at a considerable distance from the landing place, the screens were open, and this was expressly contradicted by several witnesses for the defence, who all agreed in swearing that the screens were closed and the dampers shut before the boat approached the wharf, and were kept in that state until the boat had gone two miles from the wharf and returned to the wharf to aid in putting out the fire ; and the defendants' evidence further was that the invariable practice is, to close the screen and dampers, and that when the dampers are closed no sparks and very little smoke would escape : that it is not necessary to have the dampers open at the wharves, because they take care to have a sufficient head of steam to carry them away without firing when at the wharves : that if it is a correct statement of what can be done to avoid danger, amounting as it apparently did to evidence that the boat can be so managed as that there shall be no danger from sparks while lying at the wharf, the inference would be justified that if fire was communicated from the funnels

that circumstance alone would prove negligence : that if the jury found that the steamboat sparks could not be altogether avoided while at the wharf without interfering with the efficient working of the vessel, then they should not find the defendants guilty of negligence unless they found that the screens, or one of the screens, was allowed to be open while at the wharf, and so near to the wharf or landing place as to expose the wharf or lumber to danger, and that the fire was caused by a spark which escaped by reason of the screen being open.

As to contributory negligence, he told the jury that if defendants in piling their lumber where it was, and in having no more protection against fire from steamboats than they were shewn to have had, did what persons of ordinary care and skill would not have done under the circumstances, and so contributed to their own own loss, they could not recover.

As to damages, he told the jury that if the plaintiffs were entitled to recover they should receive what would put them in as good a condition as before the fire, as far as the damages had been the direct consequence of the negligence of the defendants : that he saw no reason to separate the mill from the lumber, any more than to discriminate between piles of lumber near where the fire commenced and those in more remote parts of the yard ; but for the purpose of an objection made on this point on the part of the defence, he asked the jury to find as to the mill separately.

Mr. *Cameron* objected to the learned Judge telling the jury that they might test the credibility of the defendants' witnesses by the evidence of those witnesses who spoke of the screens being open at other times and other places than where the fire occurred, when, according to the statement of the defendants' witnesses who were engaged in the working of the screens and furnaces, such an occurrence was impossible, and that they could apply this evidence as a test of the credit to be attached to the statement of these witnesses of the defendants on this particular occasion. He objected also to that part of the charge in which the

learned Judge said that in the particular case he referred to the occurrence of fire from sparks would be of itself evidence of negligence.

In reference to these objections the learned Judge noted, as to the first, that his charge was that the evidence of the plaintiffs' and defendants' witnesses was in direct conflict as to the fact of the escape of sparks, or the probability of their escape at the time in question: that if defendants' evidence was true, it was impossible that any sparks or black volume of smoke could have escaped, or that the screens could have been seen open: that the jury had to decide between the two classes of witnesses: that the defendants' witnesses said not only on this occasion the dampers and screens were closed, but that for the whole time they had been on the boat they had never in coming to a wharf omitted to close them; and that the evidence of the persons who spoke of the screens being open at other times than the one in question, these times being always when the same persons were in charge of the boat, was proper evidence to consider as a test of the credibility of the defendants' witnesses.

The jury found for the plaintiffs, and damages as follows:

Lumber.....	\$ 73,375 95
Wharves, piers, &c.....	19,718 44
Buildings, other than mill.....	14,440 40
Plant	7,464 04

\$114,998 83

Mill.....	\$91,671 98
Saws, belts, &c.....	3,605 72

95,277 70

Total..... \$210,276 53

Leave was reserved to reduce the verdict by the amount of the mill property.

During Michaelmas term, November 16, 1875, *J. H. Cameron*, Q. C., filing a number of affidavits, obtained a rule calling on the plaintiffs to shew cause why the verdict obtained for them in this cause should not be set aside, and a new

trial had between the parties, on grounds disclosed in the affidavits; and for excessive damages; and for the admission of improper evidence by allowing the testimony of several witnesses on the point of the escape of sparks from the chimneys of the steamboat in question, at other times and in other places than the time and place when and where the fire complained of occurred; and for misdirection in this, that the learned Judge told the jury that it is a test by which you can judge of the credibility of the witnesses of the defendants, on the steamer, by the statements of those witnesses who speak of the screens being open at other times and other places than the time and place when and where the fire occurred, when, according to the statements of the defendants' witnesses engaged in the working of the screens and furnaces, such an occurrence by their constant practice was impossible. And also in telling the jury that if the sparks, according to the witnesses of the defendants, could not issue from the chimneys when the dampers and screens were closed, if the jury found the fire was caused by sparks from the steamer, this was evidence of negligence. And also in not telling the jury that the damages to the mill property proper were too remote to be recovered against the defendants. Also that the verdict was against the weight of evidence; and for the discovery of new evidence as shewn by the affidavits; or to reduce the verdict on the leave reserved at the trial.

During the term, May 25, 1876, *S. Richards*, Q. C., with him, *Bethune*, Q. C., shewed cause. They filed affidavits in answer to the affidavits filed on the part of the defence. The evidence of the screens being open on other occasions and at other places than at the time and place in question was properly received: *Field v. The New York Central R. W. Co.*, 32 N. Y. 339, 347, 348; *Sheldon v. The Hudson River R. W. Co.*, 14 N. Y. 218; *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 229; *Aldridge v. The Great Western R. W. Co.*, 3 M. & G. 515; *Woodward v. Buchanan*, L. R. 5 Q. B. 285. The verdict was justified by

the evidence: *Fremantle v. London and North Western R. W. Co.*, 10 C. B. N. S. 89; *Quebec Fire Assurance Co. v. Molson*, 1 L. C. R. 223. The evidence objected to was admissible, at all events as rebuttal evidence to test the credibility of witnesses, as ruled by the learned Judge. There was no contributory negligence shewn on the part of the plaintiffs: *Holmes v. Midland R. W. Co.*, 35 U. C. R. 253; *Jaffrey v. Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553, S. C. 24 C. P. 271. And there was no misdirection as to damages or otherwise: *Wharton on Negligence*, sec. 151; *Smith v. London and South-Western R. W. Co.*, L. R. 5 C. P. 98.

J. H. Cameron, Q. C., with him *M. C. Cameron*, Q. C., supported the rule. The evidence objected to was not admissible upon the ground taken by the counsel for the plaintiffs when he presented it, or upon the ground on which the learned Judge afterwards held it was rightly received: *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 238; *Wharton on Negligence*, secs. 872, 873. The objection was raised with the first witness and persisted in throughout the case. And there was no evidence of negligence proper for the consideration of the jury: *Scott v. The London and St. Katherine Docks Co.*, 3 H. & C. 596; *Cotton v. Wood*, 8 C. B. N. S. 568.

June 29, 1876. HARRISON, C. J.—I regret to say that in my opinion there has been a miscarriage in this case, which renders the granting of a new trial imperative.

I have come to the conclusion—after carefully reading all the cases cited, as well on the part of the plaintiffs as the defendants—that the evidence of the screens being open and the escape of sparks therefrom on other occasions and at other places than at the time and place in question, was inadmissible, and ought to have been excluded from the consideration of the jury.

The declaration charges negligence by the defendants on a particular occasion, and at a particular place, whereby, &c., and this the defendants deny.

The only issue, therefore, for determination by the jury was, whether there was the negligence charged on the occasion and at the place alleged, resulting in damage to some amount to the plaintiffs.

If, on the day and at the place in question, the screens were open and sparks escaped, one or more of which sparks set fire to the pile of lumber, there was such negligence and such damage as alleged, and the jury should find for the plaintiffs.

It could not assist the jury in coming to a determination on that issue, to shew that on other days and other places the screens were open and sparks escaped.

Such evidence would, in my opinion, in such a case be more likely to mislead than to assist the jury in arriving at a proper determination.

The Courts, as a rule, with some exceptions, are especially careful in cases of trial by jury to refuse the admission of collateral matters in evidence.

There is no such thing in a Court of law with a jury as receiving evidence *de bene esse*. The hearing of the evidence by the jury, if such evidence as ought not to have been heard, unless afterwards in some manner absolutely withdrawn from the consideration of the jury, must result in the granting of a new trial, provided in the opinion of the Court to which the application is made substantial wrong or miscarriage has thereby been occasioned. See sec. 34 of 37 Vic. ch. 7, O.

The refusal of Courts to receive evidence of collateral matters is founded on good sense.

Collateral facts are calculated to introduce a wide scope of controversy, drawing off the minds of the jury from the point really in issue. Besides, the opposite party not having notice before the trial that such evidence is to be received, cannot be prepared to rebut it: *Greenleaf* on Evidence, 12 ed., vol. i., sec. 52; *Taylor* on Evidence, 6th ed., vol. i., sec. 298; *Best* on Evidence, 5th ed., sec. 644.

The evidence objected to in this case was, according to the notes of the learned Judge, tendered for the purpose of

shewing habitual negligence on the part of the defendants, and according to the ruling, was received in advance of the testimony for the defence, for the purpose of testing the credibility of witnesses afterwards sworn on the part of the defence.

It was not, I think, admissible either on the ground on which it was tendered or received.

In some exceptional cases, witnesses are allowed to testify as to collateral facts, but in such cases their answers are conclusive : *McCullough v. The Gore District Mutual Ins. Co.*, 32 U. C. R. 610 ; S. C., 34 U. C. R. 384.

To permit witnesses for the plaintiff to testify to collateral facts, in the expectation that the evidence may contradict testimony for the defence, would be contrary to all precedent.

The cases directly bearing on the point are not many.

In *Malton v. Nesbit*, 1 C. & P. 70, where the declaration was, for a collision of ships on a particular day, owing to the negligence of the defendant, Chief Justice Abbott refused to allow the plaintiff to shew negligent conduct on the part of the defendant's captain, at an earlier part of the day on which the accident happened.

In *Aldridge v. Great Western R. W. Co.*, 3 M. & G. 515, which was an action somewhat like the present against a railway company, the only point decided was, that the case was so stated that the Court could not say that negligence was made out so as to direct for the plaintiff, or that there was no negligence so as to direct a nonsuit. But during the argument, Tindal, C. J., said, p. 521 : " If the case had gone to trial, and the plaintiff had proved that the engines had frequently set fire to stacks, that would have shewn negligence ; but it does not appear that such an accident had ever happened before." And Maule, J., said, p. 522 : " The case does not state that sparks had ever previously come from the engine."

These *dicta*, however, were afterwards qualified by the same learned Judges who, with others, delivered judgment in *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 229. The action was against a railway company for so

negligently managing and conducting an engine that certain premises of the plaintiff, adjoining the line of railway, were destroyed by fire. In order to shew that the fire was probably caused by sparks or particles of ignited coke emitted from the funnel or chimney or from the fire box of the engine by which the train was being propelled, the plaintiff's counsel proposed to ask a witness whether he had not on *other* occasions observed sparks or ignited matter to proceed from engines of the defendants passing along the line adjoining the plaintiff's farm. It was objected on the part of the defendants that this was not a proper question, insomuch that it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from other engines passing the spot on other occasions without shewing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident. The *dicta* of Tindal, C. J., and Maule, J., in *Aldridge v. The Great Western R. W. Co.*, 3 M. & G. 515, 521, 522, were relied on upon the part of the plaintiff, and on the strength of these *dicta*, Alderson, B., who tried the case, received the evidence. The jury returned a verdict for the plaintiff. A rule *nisi* was afterwards granted on the ground of improper reception of evidence. The learned Judge who tried the case reported to the Court that he held the evidence admissible for the purpose of ascertaining whether or not sparks or ignited particles of coke *could* be thrown to so great a distance from the line as the spot in question.

In delivering judgment in *Piggot v. Eastern Counties R. W. Co.*, 3 C. B. 229, Tindal, C. J., said, p. 241: "With respect to the evidence that was objected to, I think it clearly was admissible for the purpose for which it was received, viz., to ascertain the *possibility* of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any *other* purpose, it is unnecessary to enquire."

Maule, J., said, p. 242: "The matter in issue was, whether or not the plaintiff's property had been destroyed by fire proceeding from the defendants' engine: and involved in that issue was the question whether or not the fire *could* have been so caused. The evidence was offered for the purpose of shewing that it *could*: and for that purpose it was clearly material, and admissible."

Coltman, J., said, p. 241: "It appears from the report of the learned Judge, that the evidence in question was admitted, *not* for the purpose of shewing a general habit of negligence on the part of the company, but to shew that the injury *might* have been caused in the way suggested," and for that purpose he held it admissible. Cresswell, J., concurred.

It would seem that the decision in *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 229, is not inconsistent with the ruling of Abbott, C. J., in *Malton v. Nesbit*, 1 C. & P. 70; and the latter case is an authority against the admission of the evidence in this case, either for the purpose suggested by the counsel for the plaintiffs when pressing the reception of the evidence, or for the purpose suggested by the learned Judge after he had received the evidence.

In *Fremantle v. The London and North Western R. W. Co.*, 10 C. B. N. S. 89, I do not find according to the report of the case that such evidence was either tendered or received.

It appears to me, that the weight of English authority is against the reception of the evidence objected to in this case for the purpose for which it was either tendered or received.

Mr. Bethune, in the absence of any English authority supporting his contention, relied upon some United States authorities.

The United States authorities on the point are contradictory, but even if uniform, and opposed to the English authorities, we should not feel at liberty to follow them.

In *Re Baltimore and Susquehanna R. W. Co. v. Woodruff*, 4 Md. 242, decided in 1853, which was an

action against a railway company for the recovery of damages because of fire negligently communicated to the plaintiffs' property from the defendants' locomotive, the plaintiffs offered to prove that before the occurrence of the fire in question fire had been communicated by defendants' engine to the property of others; but the evidence was held by the Court of Appeals to be inadmissible either to prove that defendants' engine created the fire in controversy, or to rebut the defendants' proof of care and diligence.

In *Sheldon v. The Hudson River R. W. Co.*, 14 N. Y. 218, decided in 1856, but in which no reference was made to the preceding case, and which was an action to recover the value of a building burnt, as it was alleged, by sparks from one of the defendants' engines, which passed shortly before the fire, and was claimed to have been carelessly managed and unskillfully constructed, evidence that engines of the defendants passing near that place on other occasions emitted sparks and coals which fell *further* from the track than the building in question, was received after the plaintiff had given evidence tending to exclude the probability that fire was communicated by other means.

The judgment in favour of the admission of the testimony was read by Denio, C. J. And Justices A. S. Johnson, Seldon, and Mitchell, Judges of the Court of Appeal, concurred; so did Mr. Justice Hubbard, who was an *ex officio* justice of the Court; but Justice Comstock of the Court of Appeal, and Justices T. A. Johnson and Wright, *ex officio* Justices of the Court, dissented. The dissenting opinions are not published; but the weight of the case as an authority for the support of the general proposition for which it was cited is much lessened; first, because so many of the Judges dissented from the decision pronounced; and secondly, because the decision itself is contrary to that of the Court of Appeal in Maryland, a fact not present to the minds of the Judges when deciding the case.

Besides, the ground on which the decision was rested by Hubbard, J., is not inconsistent with *Piggot v. The Eastern Counties R. W. Co.*

He said, p. 222: "It is not essential to determine the effect of the evidence upon the charge of negligence; it is enough if the same was competent for any purpose. I think it was competent for the purpose of shewing that sparks *might* have escaped from the defendants' engine, and been borne by the wind to a distance from the railroad track equal to that of the mill house in question; thus shewing a *possibility*, and in connection with other circumstances a probability, that the fire originated in the manner alleged in the complaint."

The same Court afterwards, in *Field v. The New York Central R. W. Co.*, 32 N. Y. 339, decided in 1865, adhered to their former decision notwithstanding the decision of *The Baltimore & Susquehanna R. W. Co. v. Woodruff*, 4 Md. 242, which was cited by counsel on the argument. So in the recent case of *Webb v. Rome, Watertown, and Ogdensburgh R. W. Co.*, 49 N. Y. 420; S. C., 4 Am. Railway Reports, 547, in a similar action, where the Court allowed the plaintiff to give evidence, shewing that the defendant's engine, for a month or two before the fire, had dropped quantities of live coal in the locality of the fire; that there were live coals at other places at the time of the fire; and that coal at other times had dropped from the engine in question—to all of which the defendants objected, and the Court of Appeal held that the evidence was pertinent and proper.

So far, all that can be said about the United States decisions to which I have referred, is, that the Courts of Appeal of Maryland and New York, respectively, are at variance on the point.

I prefer the decision in the State of Maryland, because I think that it is more than the New York State decisions in accordance with the English decisions, and with the rule which excludes evidence as to collateral issues.

While conceding, on the authority of *Piggot v. The Eastern Counties R. W. Co.*, 3 C. B. 229, that evidence such as objected to here may be received on the question whether a particular engine is capable of projecting fire to a particular

distance, as to which there was no such question here, I cannot hold that it is admissible for any such purpose as suggested by counsel for the plaintiffs in this case when he tendered the evidence, or for any such purpose as suggested by the learned Judge when he ruled in favour of the reception of the evidence.

This conclusion renders unnecessary any expression of opinion on the other points raised in the rule.

In my opinion the rule must be made absolute, without costs.

MORRISON, J., and WILSON, J., concurred.

Rule absolute.

JACKSON ET UX. V. YEOMANS.

Mortgage—Absence of covenant to pay—Verbal promise to pay, on the mortgagee waiting for two months—Possession—Statute of frauds.

Defendant, having purchased land from the plaintiff for \$6,000, paid \$400 down, and gave a mortgage for the balance of \$5,400, \$400 of which was to be paid on an event specified, \$1,000 within three months, and the remaining \$4,000 in three equal payments in six, twelve, and nine months from the date of the mortgage; but the mortgage contained no covenant to pay. The first payment of \$400 was made, and afterwards, in consideration of the plaintiff forbearing to take any proceedings on the mortgage for two months, defendant promised to pay the \$1,000 then overdue. The plaintiff, having waited accordingly, and left the plaintiff in possession for that time, sued upon this promise.

Held, WILSON, J., dissenting. that he could not recover, for that the promise, which was verbal, was a contract for an interest in land, within sec. 4 of the Statute of Frauds; and that if it amounted to a lease, it was not one within sec. 2, so as to be good without writing.

Per WILSON, J.—The agreement was a demise, and within sec. 2, and the \$1,000 promised to be paid might for this purpose be treated as rent reserved for the two months.

THE declaration and other pleadings in this cause will be found in 28 U. C. R. 307.

The mortgage given by defendant to the female plaintiff will also be found set out in the same place.

The cause had been brought down to trial six times.

The first trial was before Hagarty, C. J. C. P., in the Fall of 1868, at Belleville, when a verdict was rendered for the plaintiff for \$1,000. This verdict was set aside, on the ground that the verdict was unsatisfactory: 28 U. C. R. 307, 312.

The second trial was before Wilson, J., in the spring of 1869, at Belleville, and the jury failed to agree.

The third trial was before Morrison, J., in the Fall of 1869, at Belleville, and the jury again failed to agree.

The fourth trial was before Gwynne, J., in the Spring of 1870, at Belleville, and the jury again failed to agree.

The fifth trial was before Hughes, Co. J., in the fall of 1873, at Belleville, when a verdict was rendered for the plaintiffs for \$1,340 ; but this verdict was afterwards set aside, on the ground that the female plaintiff, as the law then was, had been improperly called as a witness on her own behalf.

The last trial was before Galt, J., at Belleville, at the last Fall Assizes. The learned Judge dispensed with a jury, and found a verdict for plaintiff for \$1,450.

The female plaintiff, before 23rd January, 1868, owned sixteen acres of lot 19, in the 5th concession of Madoc.

It was on that day conveyed by her to the defendant for the sum of \$6,000. The defendant paid \$600 in cash, and gave a mortgage for the balance of \$5,400. The latter amount was payable as follows :—\$400 within twenty-four hours after the result of a crushing of rock from the shaft upon the land was ascertained, such crushing to take place as soon after twelve days from the date of the mortgage as a mill could be procured to do the same ; the further sum of \$1,000 within three months from the date of the mortgage, and the remaining \$4,000 in three equal payments, to be respectively made in six, nine, and twelve months from the date of the mortgage.

The ordinary covenant by the mortgagor for payment of the mortgage money was erased from the instrument before execution.

The first payment of \$400 under the mortgage was paid.

The payment of \$1,000, due on 23rd April, 1868, was never made. There was no promise to pay it contained in the mortgage.

The dispute between the parties was as to whether defendant afterwards promised, in consideration of the plaintiff forbearing for two months after default to take possession of the land, to pay the \$1,000 and interest, payable 23rd April, 1868.

The female plaintiff swore that after the day fixed for this payment, she saw the defendant in Belleville in company with her husband: that the latter, in the presence of defendant, said defendant wanted her to wait two months, and said he would pay the \$1,000 if she would wait the two months, and not put him to any trouble, or take any steps on the mortgage; and that she then and there agreed to his proposition, and did refrain for two months to take any proceedings to recover possession of the property.

The male plaintiff in all respects corroborated the testimony of his wife.

There was also the testimony of one George Orr, who afterwards sold a farm to the plaintiffs, and swore that defendant told him that Jackson and his wife had made a special agreement with him to wait two months on him, and that he was to pay the \$1,000.

The defendant was called as a witness on his own behalf, and contradicted the evidence of the plaintiff, his wife, and Orr; and swore that he never had agreed as the plaintiffs represented, and never had such a conversation with Orr as he represented.

There was other testimony given, but it had not any very material bearing on the question in dispute.

The defendant, at the time of the alleged promise, was in possession of the land, and was anxious to be allowed to retain possession.

There was no evidence given as to its annual value.

There was evidence to shew that the plaintiffs took possession before the expiration of the two months, but this was disproved by the plaintiffs.

Counsel for the defendant proposed to ask the defendant what were the arrangements between himself and his co-adventurers as to the payment of the mortgage, but this the learned Judge declined to receive as evidence.

The learned Judge found that the defendant did promise to pay the plaintiffs the sum of \$1,000 mentioned in the mortgage, if the plaintiff, Sarah Jackson, would wait two months, and would refrain from taking any steps on the mortgage, and that the plaintiffs did refrain from taking any steps on the mortgage, and did wait for the two months. He therefore entered a verdict for plaintiff for \$1,450, being the \$1,000 and interest thereon.

During Michaelmas term, November 18, 1875, *G. D. Dickson*, obtained a rule calling on the plaintiffs to shew cause why the last mentioned verdict should not be set aside; and a verdict entered for the defendant, or for a nonsuit, or to reduce the verdict, upon the grounds following:—1. That the verdict, according to the law and evidence, should be for the defendant. 2. That the plaintiffs are not under any circumstances entitled to interest, so the verdict should be reduced to \$1,000. 3. That the promise laid in the declaration was not proved. 4. That the promise was without consideration. 5. That the promise related to an interest in land, and not being in writing could not be enforced. 6. That the promise proved, if any, was a promise to pay the \$1,000 mentioned in the mortgage as due on 23rd of April, 1868, upon the 23rd of June, 1868, and not to pay \$1,000 for the forbearance and giving of day of payment. 7. That the only consideration for the alleged promise was, a giving of time to pay \$1,000, for which defendant was not liable. 8. That the weight of evidence is, that defendant did not promise as alleged. 9. That the \$1,000 alleged to have been promised was promised to be paid on the land as part of the purchase money, and not upon or for time. 10. That neither party intended thereby to create a new liability. Or why the verdict should not be set aside, and a new trial had between the parties, upon the ground

of improper rejection by the learned Judge of evidence tendered, in this, that he rejected evidence as to what was the agreement between the defendant and those interested with him as to the amount he was to pay, and the pleadings in the suit hereto in the Common Pleas, and on the ground of discovery of evidence since the trial, disclosed in the affidavit of the defendant, and of George Dean Dickson.

During Hilary term, February 24, 1876, *George Henderson*, Q. C., shewed cause. He admitted that no action would lie for the money merely under the mortgage, but contended that the evidence shewed the plaintiffs had a right to re-enter for default, and postponed the exercise of the right for two months on the promise of the defendant to pay the money at the expiration of that time, and submitted that this promise was not one under the fourth section of the Statute of Frauds. He cited *Nash v. Armstrong*, 30 L. J. C. P. 286; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Donellan v. Read*, 3 B. & Ad. 899, 906; *Souch v. Strawberrybridge*, 2 C. B. 808; *Nicholls v. Nordheimer*, 22 C. P. 53; *Alliance Bank v. Brown*, 10 Jur. N. S. 1121; *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; S. C., L. R. 3 Q. B. 272; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756. He also contended that there was no rejection of evidence, and that the alleged discovery of new evidence was answered by the affidavit of the plaintiffs, which he filed.

James Bethune, with him *G. D. Dickson*, contra. The promise relied on, was clearly within the Statute of Frauds: *Browne* on the Statute of Frauds, secs. 231, 248, 249; *Fry* on Specific Performance, sec. 403; *Cross v. Wickens*, 18 Q. B. 410; *Cocking v. Ward*, 1 C. B. 858; *Smart v. Harding*, 15 C. B. 652, 658; *Horsey v. Graham*, L. R. 5 C. P. 9; *Kelly v. Webster*, 12 C. B. 283, 290, per Maule, J.; *Wells v. The Mayor, &c., of Kingston-upon-Hull*, L. R. 10 C. P. 402, 406; *Buttermere v. Hayes*, 5 M. & W. 456; *Wood v. Leadbitter*, 13 M. & W. 838; *Cox v. Peele*, 2 Bro. C. C. 334; *Sanderson v. Graves*, L. R. 10

Ex. 234; *Marshall v. Green*, L. R. 1 C. P. D. 35; *Dart* on Vendors and Purchasers, 5th ed., 197. There was improper rejection of evidence: *Dowling v. Dowling*, 10 Ir. C. L. R. 236. And under no circumstances were the plaintiffs entitled to interest on the \$1,000: *Duncombe v. Brighton Club and Norfolk Hotel Co.*, L. R. 10 Q. B. 1071.

June 29, 1876. HARRISON, C. J.—I think the verdict is in accordance with the weight of evidence, and if there were no question of law raised in this long litigated case, the rule *nisi* would have to be discharged.

But the question of law now, so far as I am aware, for the first time raised by counsel for defence is, whether the promise found by the learned Judge who tried the cause should, under the Statute of Frauds, be evidenced by writing—in other words, whether the agreement can, under the fourth section of the statute, be said to be “a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.”

These words have given rise to a great deal of discussion, and very high authorities have said that it is impossible to reconcile all the decisions on the subject. Per Lord Coleridge, in *Marshall v. Green*, L. R. 1 C. P. D. 35, 38.

The effect of the clause is, to render the contract, if not in writing, void altogether as a contract, although it may operate as a license, so as to excuse a trespass on the land until revoked: *Carrington v. Roots*, 2 M. & W. 248.

The statute extends to interests created *de novo*, as well as to subsisting interests: *Anon.*, 1 Ventr. 361.

Mere possession of land seems to be properly regarded as such an interest in or concerning land itself as cannot be contracted for or disposed of without writing. Mr. Baron Park, it is true, in a case where the contract in question was really for an assignment of a lease, and of course not binding by parol, said that if it had been to relinquish the possession merely, it might not have amounted to a contract for an interest in land: *Buttermere v. Hayes*, 5 M. & W. 456. But upon such a casual suggestion as this it would

be unreasonable to base an exception which goes more to the letter than the spirit of the statute. See *Browne* on the Statute of Frauds, sec. 231.

Where anything is done which substantially amounts to a sale or parting with an interest in land, the contract is "for or relating to the sale of an interest in or concerning lands, tenements, or hereditaments" within the fourth section of the Statute of Frauds. Per Maule, J., in *Kelly v. Webster*, 12 C. B. 283, 290.

A bill to carry into execution an oral agreement between solicitors, that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal money and interest, and the remainder to the mortgagor, was dismissed as being within the Statute of Frauds: *Cox v. Peele*, 2 Bro. C. C. 334.

As between the mortgagor and mortgagee the fee passes to the mortgagee at the time of the execution of the deed, and the mortgagee may enter immediately, unless there be at least a written agreement to the contrary. See *Mann v. English*, 38 U. C. R. 240. See also *Newall v. Wright*, 3 Mass. 138, 155; *Inhabitants of Groton v. Inhabitants of Boxborough*, 6 Mass. 50; *Goodwin v. Richardson*, 11 Mass. 469; *Scott v. McFarland*, 13 Mass. 309; *Pomeroy v. Winship*, 12 Mass. 514; *Colman v. Packard*, 16 Mass. 39.

In *Colman v. Packard*, 16 Mass. 39, the Court said:—"There can be no doubt that the parties intended that the mortgagor should remain in possession, until there was a breach of the condition of the deed. But by the principles of the common law, as well as by our own statutes relating to the conveyance of real estate, agreements to that effect must be in writing, to be obligatory."

In Maine, where by a statute a mortgagee might recover possession before any breach of the condition "when there is no agreement to the contrary," it was held that such an agreement affecting, as it does, the title to real estate, must be in writing: *Norton v. Webb*, 35 Maine 218.

In Connecticut it was on the same ground held that a verbal agreement, made at the delivery of a

deed, that the grantee should not take possession, nor record his deed, until he should pay the first instalment of the purchase money, required a writing: *Gilbert v. Bulkley*, 5 Conn. 262.

The words, "lands, tenements, or hereditaments," as used in the fourth section of the Statute of Frauds, are used to denote a fee simple, and the other words to denote a chattel interest, or some interest less than a fee simple. Per Littledale, J., in *Evans v. Roberts*, 5 B. & C. 829, 839.

Hence, an agreement to occupy lodgings at a yearly rent, payable in quarterly portions, the occupation to commence at a future day, and possession not being taken, requires, under the statute, to be in writing: *Inman v. Stamp*, 1 Stark. 12.

An agreement to let a house, then partially furnished, and to send in all furniture for completely furnishing the house, must be in writing: *Mechelen v. Wallace*, 7 A. & E. 49.

An agreement for the sale of an equity of redemption must be in writing: *Massey v. Johnson et al.*, 1 Ex. 241.

So an agreement to sell a debt secured by a bond and also by a mortgage of land: *Toppin v. Lomas*, 16 C. B. 145.

Where the person in possession for a residue of a term of years agreed to relinquish possession, the agreement was held to be void for the want of writing: *Buttermere v. Hayes*, 5 M. & W. 456.

So where it was agreed between the plaintiff, who was the tenant of a farm, and the defendant, that if the plaintiff would surrender his tenancy, and prevail on the landlord to accept the defendant as tenant in her place, the defendant would pay £100, it was held to require writing: *Cocking v. Ward*, 1 C. B. 858. See further *Kelly v. Webster*, 12 C. B. 283; *Smart v. Harding*, 15 C. B. 652.

So an agreement to take a messuage and pay for alterations: *Vaughan v. Hancock*, 3 C. B. 766; *Simmons v. Simmons*, 12 Jur. 8.

The decision in *Buttermere v. Hayes* was followed in *Kelly v. Webster*, 12 C. B. 283, and *Smart v. Harding*, 15 C. B. 652.

In the latter case it was held that an agreement for the sale of a milk walk, by which the plaintiff agreed to let the defendant into occupation of premises, of which the plaintiff was tenant, is a contract concerning an interest in land, and must be evidenced by writing.

An agreement by the termor to quit possession on a certain day, and pay all out-goings up to a certain time, in consideration of a sum of money to be paid to him by a party who has agreed with the landlord for a lease of the premises on the termination of a subsisting term, or an agreement by a tenant, under similar circumstances, that he will part with the land, and that the intended lessee will take it, must be in writing: *Smith v. Tombs*, 3 Jur. 72. See further *Foquet v. Moore*, 7 Ex. 870.

In *Hodgson v. Johnson*, E. B. & E. 685, where it was agreed that the plaintiff should take possession of a brick yard which defendant was occupying as a tenant, and take the plant and bricks there at a valuation, it was held that the agreement must be in writing.

The ruling in *Hodgson v. Johnson* was upheld and followed in *Johnstone v. Cowan*, 25 U. C. R. 470.

In *Horsev v. Graham*, L. R. 5 C. P. 9, where the plaintiff, being desirous of obtaining a transfer of the lease of a public house from the defendant, who was a public house broker, signed an agreement in the following terms:—"Mr. H. (the plaintiff) now informs me he is in possession of £60 cash, and such being the case, I hereby agree to get the lease and everything for such sum of £60 cash," was a contract necessary to be in writing, under the Statute of Frauds.

In *Draper v. Holborn*, 24 C. P. 122, where, under an oral agreement for a lease made between defendant and plaintiff for ten years on the terms of the plaintiff clearing or paying rental, either in clearing or money, and defendant afterwards sold the lot, it was held that the plaintiff could not recover, even for the value of the clearing done, without proof of an agreement in writing.

Whether a contract in writing is essential or not depends on whether, by the agreement between the parties, it was

intended to confer an interest in land, or whether, apart from any intention, the effect of the agreement was such as necessarily to confer such an interest. Per Lord Coleridge in *Wells v. Mayor, &c., of Kingston-upon-Hull*, L. R. 10 C. P. 402, 406. See further *Sanderson v. Graves*. L. R. 10 Ex. 234.

The result of the authorities would appear to be, that wherever the conferring of an interest in land, however small the interest, by one party, is the consideration for the promise of the other, the agreement must be in writing.

The only right which the defendant had to the possession of the land here was until default. From and after default not only was the legal estate, but the right to immediate possession, in the plaintiffs: *Mann v. English*, 38 U. C. R. 240.

It was, however, competent for the mortgagee, on or after the day of default, to refrain from taking possession, and for a valuable consideration to undertake not to do so, either at all or for some given time, and to the extent that he contracted to do so there would be a transfer of an interest in land.

It appears to me that this was the effect of the agreement entered into between the parties, as found by the learned Judge, and that such an agreement is clearly one which, under the fourth section of the Statute of Frauds, requires writing to make it valid.

There can be no foreclosure until default in payment, according to the agreement; but as the right of redemption may be postponed during a certain period, so the mortgagee's right to call in the money, and consequently to foreclose or sell, may also be limited: *Burrowes v. Molloy*, 2 J. & Lat. 521; and the limitation may be greater than that upon the right to redeem, for the same reason does not exist for guarding the rights of the mortgagee as of the mortgagor: *Fisher on Mortgages*, vol. i. 3rd ed, sec. 229.

If there be an absolute covenant not to call in the money during a certain period, no default of payment of interest during that period will enable the mortgagee to sue, not-

withstanding the breach of the condition of the mortgage, though if there be no such covenant the mortgagee can sue at any time after default in payment of interest, however distant may be the day at which the payment of the principal money is reserved: *Fisher on Mortgages*, vol. i., 3rd ed., sec. 537, referring to *Burrowes v. Molloy*, 2 J. & Lat. 521.

Neither can a puisne mortgagee, who has covenanted not to foreclose during a certain time, proceed to redeem the first mortgagee, and to get a conveyance of the legal estate, for he has no right to sue the mortgagor, or to bring him before the Court because of the covenant, and without the mortgagor the first mortgagee cannot be sued: *Fisher on Mortgages*, vol. i., 3rd ed., sec. 537, referring to *Ramsbottom v. Wallis, Coote on Mortgages*, App. 576, 580.

Whether the promise be contained in a covenant which imports consideration, or be without a seal for a valuable consideration, it is equally binding on the mortgagee, and in favour of the mortgagor.

The restraint of the rights of the mortgagee, so long as it lasts, secures to the mortgagor the enjoyment of the land.

This has the effect of conferring an interest in the land to the mortgagor for the time agreed, and must, I think, be in writing, under the statute, to be enforceable when disputed.

Here the mortgagees distinctly swear that there was such an agreement, and the mortgagor as distinctly swears there was no such an agreement. On the one side or the other there is false swearing. The object of the statute is, to prevent false swearing in just such a case; and where the statute requires a writing to evidence the contract, we have nothing to do with the question of the mere weight of evidence.

I cannot avoid the conclusion that this case is not only within the language of the statute, but within the mischief which the statute was designed to remedy.

It was, however, argued on the authority of expressions of opinion to be found in *Donellan v. Read*, 3 B. & Ad.

899, 906; *Cherry v. Heming*, 4 Ex. 631, 635; *Souch v. Strawbridge*, 2 C. B. 808, and *Lavery v. Turley*, 6 H. & N. 239, and other cases, that where an agreement has been entirely performed on one side the statute is inapplicable.

In *Johnstone v. Cowan*, 25 U. C. R. 470, I, when at the bar, addressed a similar argument to this Court, then consisting of the present Chief Justice of the Court of Appeal, the present Chief Justice of the Common Pleas, and my brother Morrison, but without success.

Chief Justice Hagarty (then Mr. Justice Hagarty) in delivering judgment said, at p. 477, referring to *Hodgson v. Johnson*: "If we follow this case, decided in 1858, we cannot uphold the plaintiff's claim. There are many expressions scattered through the cases as to performance taking the case out of the statute, which support the plaintiff's view; but this case seems so express that, I think, in this Court, at least, we should follow it."

Johnstone v. Cowan has since been upheld, and followed in *Taylor v. Knowles*, 30 U. C. R. 200; but the authority of *Hodgson v. Johnson* has recently been somewhat shaken in *Pulbrook v. Lawes*, L. R. 1 Q. B. D. 284.

It is now decided that the payment by the purchaser to the vendor of the whole or part, whether substantial or unsubstantial, of the purchase money, is not an act of performance which will take an oral contract out of the Statute of Frauds: *Fry on Specific Performance*, sec. 403. See also *Johnson v. The Canada Co.*, 5 Grant 558. But where a landlord, having verbally agreed with his tenant to grant him a lease for twenty-one years, at an increased rent, with the option of purchasing the freehold, died before the execution of the lease, and before his death the tenant had paid one quarter's rent at the increased rate, this was held to be sufficient part performance to take the case out of the Statute of Frauds: *Nunn v. Fubian*, L. R. 1 Ch. 35.

The cases, however, as to specific performance in equity rest on a ground so peculiar to Courts of equity as to afford no real support to the plaintiffs' contention in the present case.

It must now be taken as settled that in cases falling within the fourth section of the Statute of Frauds the performance of those terms which directly bring the case within the statute will not, at all events at law, have the effect of taking the case out of the statute with regard to the other terms. See *Chitty on Contracts*, 9th ed., 422; *1 Sm. Leading Cases*, 7th ed., 339, 340, and the many cases cited in note *i* to p. 422 of 11th Am. ed. of 9th London edition of *Chitty on Contracts*.

I believe my brother Wilson is of opinion that the agreement in this case amounts to a demise, under the second section of the statute, and requires no writing.

This view was not presented at the bar, but whether presented or not should prevail, if sustained by the evidence.

The first section of the Statute of Frauds declares; "That *all leases*, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either at law or in equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, * * to the contrary, notwithstanding."

The second section excepts all leases not exceeding the term of three years from the making thereof, *whereupon* the rent reserved to the landlord during such term shall amount unto two-third parts, at the least, of the full *improved* value of the thing demised.

The reading of the clause would lead to the conclusion that the demises intended by it are ordinary demises, whereby the relation of landlord and tenant is created, the property demised improved, and the rent two-thirds at least of the full improved value.

If the effect of the agreement, as proved between the plaintiffs and the defendant, was to establish the relation of

landlord and tenant for the term of two months, and the lease can, on the evidence, be said to be one whereupon the rent reserved to the landlord during such term shall amount to two-thirds parts, at the least, of the full improved value of the thing demised, no writing would be necessary, and whatever remedy can be had on the demise in its character as a lease may be properly resorted to, notwithstanding the want of writing. See *Ryley v. Hicks*, 1 Str. 651; *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 Cr. & J. 391; *Bolton v. Tomlin*, 5 A. & E. 856; *Clarke v. Serricks*, 2 U. C. R. 535.

But I am not satisfied that the relation of landlord and tenant, such as intended by the section, was created between the parties by the agreement found by the learned Judge who tried the cause, or by anything that was done thereunder, and I certainly find no evidence even to shew that the demise is one "*whereupon* the rent reserved to the landlord during the term amounts to two-thirds parts, at the least, of the full improved value of the thing demised."

The second section of the statute does not except *all* leases for three years, but only *such* whereupon the rent reserved amounts to two-third parts, at the least, of the full improved value of the thing demised.

I have no right, as a Judge, to read the section so as to exclude from consideration the latter qualification.

I am aware that in the decided cases sufficient attention has not been paid to this provision in the section, but this of itself is no reason for disregarding a provision which is in language so clear as to admit of no doubt, and so positive as to admit of no qualification.

The first section of the statute furnishes a rule that *all* leases shall be in writing.

The second section is an exception to the rule,—that is to say, that *certain* leases in the section described need not be in writing.

In looking at the description of the leases excepted, I have no right to shut my eyes to the requirement that they shall be leases whereupon the rent reserved is such as the section mentions.

I have no right, under such a statute, to hold that the validity of the excepted lease depends *solely* on the duration of the term, when I find the section in clear terms adding *another* requisite which must curtail the operation of the exception.

To read the second section so as to admit the requirement as to duration of time, and reject the requirement as to rent, would be to legislate, and not simply to interpret an enactment of the Legislature.

Either the second section of the Statute of Frauds is in force in this Province, or it is not. If it is in force, it is in force in its entirety. If it is not in force, the exception cannot prevail. If it is in force in its entirety, the exception cannot, I think, on the evidence, avail the plaintiffs here.

The first section of the statute seems to be co-extensive with the fourth, and consequently every interest which is within the fourth section is equally within the first, unless it come within the saving clause of the second section: *Sug. V. & P.*, 13th ed., p. 97.

The first and second sections, taken together, enact that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, whereupon the rent reserved shall amount to two-third parts, at the least, of the full value of the thing demised: *Ib.*

So that assuming, without deciding, that there was a lease between plaintiff and defendant, it is not, in my opinion, shewn by the evidence to be such a lease as described by the second section, and therefore falls within the operation of the first and fourth sections of the statute, and cannot be enforced unless in writing. See *Browne* on the Statute of Frauds, sec. 32.

It is unnecessary for me to consider the question of the alleged rejection of evidence, or discovery of new evidence disclosed in affidavits filed.

In my opinion the rule must be made absolute to enter a nonsuit on the point raised under the Statute of Frauds.

MORRISON, J., concurred.

WILSON, J.—The declaration states that in consideration the plaintiffs would give day of payment to the defendant for the payment of the \$1,000 instalment on the mortgage then lately overdue, and would forbear to enforce their rights under the mortgage for two months, the defendant would pay the \$1,000 and interest; and the declaration avers that the plaintiffs did so give day of payment, and did forbear as aforesaid.

The learned Judge found these facts to be proved.

I am of opinion that such a cause of action is not one relating to an interest in lands. It is only an agreement not to sue. And I conceive a creditor may agree not to sue out a *hab. fac. poss.* in ejectment for a specified time, or not to sell his debtor's land under a *fi. fa.*; and that a landlord might agree with his overholding tenant not to enter upon him, or not to bring an ejectment against him for a specified time, without a writing, but, of course, upon a valid consideration. Such cases are not, in my opinion, within the Statute of Frauds.

But the agreement proved was more than that—it was, as Mrs. Jackson said, that “if she would take no action to foreclose, and would give the defendant peaceable possession for two months, he, the defendant, would pay the \$1,000,” and all parties agreed to it; and she also said, “The defendant was to have possession for two months longer.”

The agreement in the declaration was therefore not proved. The one pleaded does not relate to an interest in land. The one proved does, and it was not shewn to have been in writing; and I am of opinion the contract, as laid in the declaration, was not proved, and that the plaintiffs failed for that cause, unless an amendment be allowed.

They failed also to prove by writing such a contract as was proved, if the contract is one which can be established by writing only. Whether a writing was necessary or not depends upon the fact for what length of time the defendant was to have had the possession. The agreement was for two months. What was his interest during that time? He was before a tenant under the mortgage. He remained

after the default, and up to the time of the contract, in possession as theretofore, and he was to remain in possession for the further period of two months. In my opinion he became or continued to be a tenant for that period. If so, no writing was required for such a period, if the proper amount of rent was received upon it.

It is a mistake to say the statute makes void all leases which are not in writing. It reduces them to estates at will only, except in the case of a lease not exceeding three years, and such a lease is valid without writing if the rent received amount to two-thirds of the full improved value, and if it do not, the estate is in like manner one at will only.

The payment by the defendant of the \$1,000 for that two months' occupancy, was far in excess of the sum required to make valid such a demise. It may, I think, to give effect to the arrangement, be deemed for the purpose to be rent reserved.

If this latter view be a correct one, then the declaration can be amended by setting out in it the contract which was proved, and there can be no difficulty in doing so, if the objection to the want of a writing be removed, as I think it is, and can be.

I am not satisfied with the finding of the learned Judge, but after so many trials I do not feel disposed to interfere with it.

In my opinion, if the amendment be made which I have mentioned, the rule should be discharged.

Rule absolute.

REGINA V. FITZGERALD.

Indictment—Embankment—Obstructing highway.

About thirty-five years ago one S., with the assent of the then road commissioners, built a dam or embankment eighteen feet wide along the line of road, where there was a valley and creek, being allowed therefor five years' taxes and statute labour. This embankment was used for the purposes of his mill and for the highway. Nothing was said as to who should keep it in repair, and statute labour was afterwards done upon it as elsewhere. The embankment having become too narrow and unsafe, the defendant, the owner, was indicted for putting the embankment on the highway, and permitting it to remain there, as an obstruction.

Held, that the indictment would not lie, for he could not, under the facts stated, be compelled to remove the embankment, though he might be required to remove any water collected on the highway there, and indicted for neglect to do so, or might be liable in a civil action for the injury thus done to the embankment.

Quere, whether upon such an indictment tried on the civil side, and a verdict for the Crown, the verdict can be entered for the defendant on leave reserved. The proper course is, to reserve a case under the statute, C. S. U. C. ch. 112.

INDICTMENT for stopping up a highway between lots 6 and 7, in the 2nd concession of the township of South Dumfries, in the county of Brant.

The cause was tried at Brantford, before Burton, J., at the Spring Assizes, 1875, on the civil side.

The material part of the evidence was as follows:—

Orpheus Robinson, P. L. S., said: The road is narrowed to the width of twenty-four or twenty-five feet by an artificial embankment, constructed partly on the road, which road is one chain wide. In some places it is narrowed by the pond to the width of twelve feet. It is not guarded by any railing.

In cross-examination.—There is a valley where the dam is built, I should think ten feet or more below the level of the top of the embankment. The road is the main road leading from St. George to Brantford. If the bank was not there, there would have to be a bridge built. The top of the embankment is smaller than the top of most embankments or travelled roads in the township. I should think they would average $16\frac{1}{2}$ feet.

David Baptor, township clerk, proved notices from the council to the defendant to remove the embankment. The

embankment is only about nine feet wide—too narrow for teams to pass—not a safe condition for a road to be in.

Cross-examination.—I think some statute labour has been done on it. The road is narrower than it was in 1851.

Benjamin Bell said the embankment was there long before the defendant went there.

Robert Burt, the warden of the county, said: The water rises sometimes, and washes the embankment away. We should not object to its being there if defendant kept it at its proper width. The repairs would cost ten times as much with the dam as without it. The main part of the pond is on our road, perhaps forty feet, or a little more.

Cross-examination.—I don't know how deep we should require an embankment if the dam was away; but not more than half the height of the present embankment. If there was no dam, we should have had a culvert in the centre and girded at each end. I have no doubt statute labour was done on the dam long before the defendant was there. It might cost us \$100 to make the embankment in addition to the culvert.

Re-examined.—There are forty feet of the road under water, and the width of the roadway is in consequence reduced to about nine feet in some places.

Re-cross-examined.—We would have graded the road about twenty-five feet, and built a bridge about twenty or twenty-five feet, if we had been building a road there before the dam was placed there.

Purvis Laurason: Before the dam was put up, you could step across the stream. The road was opened and travelled before the dam was put up, but it was rather a bad piece of road. I should judge the embankment is some twelve feet higher than the original road allowance. I regard the embankment as at present very unsafe. In some places the top of it is only nine feet wide, with a steep incline on one side and the water on the other.

Cross-examination.—We should have made a bank and a culvert, but not the height of the present bank. I did not consider it a nuisance when Stanton first built it, that

is, when it was kept in repair and eighteen feet wide. I think a road of fourteen or sixteen feet would be sufficient. I do not think the road, at the widest part, is quite fourteen feet wide.

Re-cross-examination.—An embankment of four or five feet would be an advantage ; taking a portion of the top off the hill, a very little cutting and filling would answer. As the road now stands, the portion covered with water could not be used conveniently, as the sides of the embankment extend into it.

William Austin, the lessee of the property, said : He did repairs to the embankment for defendant in 1873. The township, also, when statute labour was doing, would have some done on the dam.

Hezekiah Mainwaring : The dam was erected more than thirty years ago. It was an advantage when kept in repair.

Ralph Simpson : One could easily walk over the whole 66 feet before the dam was there.

Defence.

George Stanton said : I owned the property and built the dam thirty-five or thirty-six years ago. I erected it with the assent of the commissioners of those days, Mr. Ellis and another. They approved of the plan, and thought it a good thing for the township and the mills. They made me an allowance for five years of my taxes and statute labour. They inspected it after it was finished and felt pleased with it. Before I built the dam teams could pass, but it was a very poor road, the hills being very steep. I did not see how they could make as good a road as I did, except by doing as I had done, or a bridge right across. I think it cost \$1,000. The engagement was to make it 18 feet wide ; I made it that width. There was nothing said about who should keep it in repair. I saw statute labour done upon it as upon any other part of the road. I repaired it when I saw any damage done to it as a dam. I remained in possession sixteen or eighteen years. There was a level valley, a small creek, and the hills steep, so that it was not easy of travel, and people travelled some distance round. I

never received assistance from the council for repairing it.

The learned Judge has noted that he left it to the jury to say, after defining what constituted a wrongful interference with the highway, whether the evidence satisfied them that the defendant had wrongfully continued the erection placed upon the highway by Stanton, or whether the work subsequently done was by his direction, finding in either case whether the obstruction was of that substantial nature as to interfere with the original highway: that this was the only remedy open, as the defendant was not liable to repair the new embankment, and if that was allowed to get dangerous, the only remedy was, by treating it as a wrongful obstruction, and they must consider whether the highway had been so obstructed by the defendant.

Mr. *Martin* took several objections to the proceedings; and leave was reserved to him to move upon any objection which was open to him upon the evidence as fully as if it were a civil proceeding, if it is open to him in such a case so to move.

The jury convicted the defendant.

In Easter term, May 19, 1875, *Edward Martin* obtained a rule calling upon the private prosecutors to shew cause why the verdict should not be set aside and a new trial granted, for the misdirection of the learned Judge who tried the cause, on the following grounds:—

1. That the cause for the Crown was opened in respect of an embankment, alleged to have been placed in the year 1863 on and narrowing the highway, and the plaintiff called witnesses to prove the case so made, and afterwards was allowed to give in evidence facts to shew an obstruction of a different kind, alleged to have been made by the defendant in the year 1873, as well as the said embankment charged to have been placed on the highway in 1863.

2. That the Crown was allowed to give evidence of an embankment which was on and formed part of the high-

way in 1863, and which still remained on the highway and was the alleged nuisance charged; and also evidence of facts occurring in 1873 in regard to certain works alleged to have been done by the defendant not in or upon the said embankment placed on the highway prior to 1863.

3. That the jury were told it was no excuse or defence, on the facts proved, that the embankment was not originally placed in its position by the defendant; or that it was accepted by the public as part of the highway, and was used as such for upwards of thirty years, and down to and at the time of the trial, and that it was the only way of crossing the hollow over which it was built; or that statute labour had been from the time of building thereof usually performed thereon; or that the said township of South Dumfries were the private prosecutors; or that the defendant was not proved to have had any actual possession or control over the same; or that the municipal authority had contributed to the erection of the original embankment; or that the defendant had been prohibited by the said corporation from interfering with the said embankment.

4. Or why the verdict should not be set aside and a new trial granted, on the ground that there was evidence rejected which was duly tendered by the defendant, being the pleadings and decree in a certain information in Chancery, filed by the Attorney-General on behalf of the Crown and the said township of South Dumfries as plaintiffs, against William Fitzgerald, the defendant therein and herein, which information charged that the defendant was liable to repair the embankment, the subject of this indictment, at the time and on the occasions, or some of them, in respect of which the defendant is charged, and narrowing said highway by means of the said embankment, and which information was dismissed on the merits.

5. Or why the verdict should not be set aside and a new trial granted, or a verdict entered for the defendant, pursuant to leave reserved at the trial, on the ground that there was no evidence given on which the defendant could be convicted of a nuisance, as charged; and because the verdict is against evidence and the weight of evidence.

6. Or on the ground that it was proved that the township were the private prosecutors, and that they had accepted the said embankment as part of the highway, caused statute labour to be usually performed thereon for many years, and could not afterwards complain of it as a nuisance.

7. Or on the ground that the embankment was part of the highway, and if it became narrow it was the duty of the township to repair it.

In this term, June 2, 1876, *M. C. Cameron*, Q. C., shewed cause, and cited *Spalding v. Rogers*, 1 U. C. R. 269.

Edward Martin, Q. C., supported the rule. He referred to *Regina v. The Corporation of the Village of Yorkville*, 22 C. P. 431; *Angell on Watercourses*, 6th ed., 189; 50 Geo. III. ch. 1, sec. 2; 1 Vic. ch. 21, sec. 20; *Rex v. Tindall*, 6 A. & E. 143; *Regina v. Russell*, 3 E. & B. 942; *Regina v. Betts*, 16 Q. B. 1022; *Regina v. United Kingdom Electric Telegraph Co., Limited*, 31 L. J. Mag. Cas. 166. The bill in Chancery was admissible: *Regina v. Maybury*, 4 F. & F. 90; *Regina v. Inhabitants of Haughton*, 1 E. & B. 501.

June 29, 1876. WILSON, J.—We have set out the rule verbatim, because we suppose it contains all that can be said for or against the conviction.

If the Court can review the case on this rule, upon the leave reserved, as if it were a civil proceeding, the principal question will be, whether the defendant, who was the owner of the adjoining property and mill, mill dam, pond, and the appurtenances at the time of the finding of the said inquiry, can be compelled by this indictment to remove the embankment which was originally, about thirty-five years ago, placed where it is with the leave of the proper authorities by the owner of the adjoining property, for the service of his mill, and which was accepted by them as a work also for the public advantage, to be used, and which has been used from that time forward as the highway, or as a part of it?

As an abstract rule, a person, however long he may have had an obstruction on the public road, acquires no title as against the public to have it there, and he may be required to remove it.

And it may be that when Stanton put the embankment on the highway, whether he agreed to keep it in repair or not, he might, while he occupied a part of the highway, be bound to keep it in repair, and might be indicted for not repairing it, and all those so using the highway under him might be so liable.

The township would, however, also remain liable to do the repairs, and would be subject to an indictment for not making them, and they would have to resort to their remedy against the private proprietor for redress.

The embankment put by Stanton along the road upon the low ground was not a nuisance or obstruction at the time it was put there.

He placed it there for his own private benefit, no doubt; but what he did was to the benefit of the public also, and he was allowed to make it because it would be for the public good.

If, after Stanton put it there with the proper consent, he had never built a dam or made any use of the embankment, and if that embankment were a benefit to and were used by the public, could he afterwards have been indicted for not removing it upon demand made upon him to do so? It seems that the mere statement of the case gives the answer to it: He certainly could not. Why, then, can the defendant be required to do it, merely because he used the embankment as part of his dam?

It may be that the embankment—that is, the public highway—is injured by the water of the defendant's pond. If that be so, the remedy for it is to require the defendant, or the occupier of the mill and adjacent land, and the owner of the pond, to remove the water on the highway he has collected there by means of his dam and embankment; and if he do not remove it, to indict him for the nuisance which its being and continuing there is to the highway.

It is plain he has no right as against the public to maintain his pond, or to cast any way water upon the highway. And it is of no consequence that the part of the highway he so occupies is not really required by the public, or that the damage he so causes to the public is of very little value. The public have the right to the full width of the proper allowance for roadway: *Regina v. Burney*, 31 L. T. N. S. 828.

If the township authorities should not desire to indict the defendant or the present proprietor for keeping the water on the road, they may probably have the right to maintain some form of civil action against him for the injury which he does specifically to the embankment by means of his pond and the water accumulated by it. But in my opinion they cannot require him to remove the embankment, which has been accepted by the public as, and which is in fact, a part of the highway.

And I think, under the circumstances of this case, they cannot indict him for not repairing the highway—although they may do so for any injury he does to it.

The present indictment, which is for putting an embankment on the highway, and for permitting it to remain there, is misconceived, and it mistakes his liability. The *embankment* which is there is right enough, and it being a part of the highway the obligation to keep it in repair as a roadway is primarily upon the township, as between the township and the public, although it may be the defendant may also be liable criminally for not repairing it, if he usurp any part of it for his private purpose.

The township may, as I have said, have also remedies, both civil and criminal, against the owner of the mill, land and pond, for injuring the embankment as a roadway, and may also prosecute the private proprietor criminally for continuing his pond of water upon the highway.

Upon the evidence given at the trial, the defendant should have been acquitted.

I may refer to *Rex v. Inhabitants of Kent*, 2 M. & S. 513; *Regina v. Inhabitants of the Isle of Ely*, 15 Q. B. 827; *Rex v. Kerrison*, 3 M. & S. 526.

As to the Court interfering by rule upon leave reserved to alter the verdict of the jury for the Crown, and to enter it for the defendant, I doubt if that can be done.

The statute, Consol. Stat. U. C. ch. 112, has provided a proper redress in such a case, by the reservation by the Judge of any questions of law, and it is safer and better that the course provided by statute should be adhered to.

We shall give judgment upon this rule. But it may be better that the parties should consent to have a rule drawn up as if the argument had been had upon a case reserved by the Judge under the statute.

It is intimated that the Court may grant a new trial by a motion in a misdemeanour when the verdict is for the Crown, but not when it is for the defendant: *Regina v. Johnson*, 2 E. & E. 613; *Regina v. Russell*, 3 E. & B. 942.

HARRISON, C. J., and MORRISON, J., concurred.

Rule absolute.

GRASSICK ET AL V. THE CITY OF TORONTO.

*Municipal corporation—Damage done during construction of sewer—
Independent contractors—Liability of corporation for.*

The defendants contracted with B. and A. for the construction of a brick sewer on Yonge street, under a contract which provided that the work should be done according to the directions and to the satisfaction of defendants' engineer, who had power if the contractors should not proceed according to the contract or to his satisfaction, to complete the work at their expense. During the work the city engineer visited it frequently, superintending, and two inspectors for defendants were there constantly, to see that the specifications were carried out. In order to get rid of the water coming down, it was dammed back to raise it to the level of another sewer which was used as an outlet, and in consequence of heavy falls of rain the water thus penned back overflowed into the plaintiffs' cellar. It was contended that the work being carried on by independent contractors defendants were not liable, but *Held*, otherwise, for the work was done under defendants' control and supervision: and *Quere*, whether the defendants could transfer such a work, so as to escape liability.

ACTION for not keeping the main sewer on Yonge street in a fit and proper state of repair, and for not using due and proper care in altering, repairing, deepening, and enlarging the same, by reason whereof the water in the sewer was penned back and got into the plaintiffs' cellar.

Pleas. 1. Not guilty; and 2: that the causes of action did not accrue within six months.

Issue.

The cause was tried at Toronto before Harrison, C.J., at the last Fall Assizes.

The evidence shewed that the defendants made a contract with Adam Beaty and William Ardagh, for the construction of a brick sewer on Yonge street, from King to Ann street; that the work was to be done according to certain plans, &c., "and according to the directions and to the satisfaction of the engineer of the corporation to take charge of the said works." And it was admitted that the work was done by independent contractors, and on a contract in writing, under the supervision of the city engineer.

C. W. Johnson, city engineer at the time of the performance of the work, said: "The diversion of the water was necessary and was done under my order, but the mode

was not what I proposed. I recommended an invert dam to pass it over into the Richmond street sewer, not to entirely close the Yonge street sewer. I suggested the application of a steam pump on different occasions. * * If my instructions had been carried out, there would have been a man to remove the dam in the event of a heavy storm. * * * I had not the personal superintendence; there were inspectors. They had especial charge under the board of works. It was their duty to see that the work was executed in a proper manner. The inspectors were on at the time of the floods. I think the Richmond street sewer was about 18 inches higher than the Yonge street sewer. * * It was necessary to watch the body of the outlet. In the event of an extraordinary storm it would be necessary to strike the dam. The contractors were proper men under proper guidance. I mean under the guidance of the engineer. * * Told the contractors on several occasions to have engines there. I never told the contractors to cut away the dam. * * If I had been the contractor I would have struck the dam. Should have watched and taken the precaution to liberate the surface water. I was about the sewer more or less every day. Some days could not be there at all. It was the duty of the inspectors to be there constantly. Each of them had a copy of the specifications to see that the specifications were carried out. * * In the case of a freshet the dam should have been struck."

There were clauses in the specifications referred to as shewing that the work was under the control, direction, and management of the defendants. The terms of the specifications in that respect were not given, and the specifications were not among the exhibits.

The learned Chief Justice expressed an opinion rather in favour of the contention of the defendants' counsel, that the work was carried on by independent contractors, and as a consequence that the defendants were not liable for the damage complained of, but he declined to nonsuit, reserving leave to the defendants to move the Court afterwards.

The jury found a verdict for the plaintiffs, and assessed the damages at \$200.

In Michaelmas term, November 18, 1876, *Biggar* obtained a rule calling on the plaintiffs to shew cause why a verdict should not be entered for the defendants, or a nonsuit, on the leave reserved, on the ground that the work was not done by the defendants but by independent contractors, and that their contract did not authorize any of the acts of negligence complained of: that the city engineer was only to see that the provisions of the contract were carried out, and his authority did not extend to alterations therein or additions thereto; and that the obstruction complained of was not created under or according to the direction of the defendants' engineer, and that the workmen who did the work were not the servants of the defendants.

In Hilary term, February 25, 1876, *George Kerr, Junr.*, shewed cause.

Biggar supported the rule.

The arguments and cases cited sufficiently appear in the judgment.

June 29, 1876. WILSON, J.—The case was very well and very fully argued, and there was, as is usual in such cases, an ample bead roll of authorities referred to.

We do not think it will be necessary to peruse them all.

We can quite satisfactorily dispose of the rule by selecting a few of these authorities for our guidance.

The complaint against the defendants was, that when the work on the Yonge street sewer had proceeded to the north of Richmond street it became necessary to remove from it the constant flow of water along it, in order to enable the work to be done.

The course adopted was, to open the Richmond street sewer, but as that one was about eighteen inches higher than the Yonge street sewer a dam was built across the Yonge street sewer to raise the water in it to the level of the Richmond street sewer to permit the water to flow from the Yonge street to the Richmond street outlet.

That dam occasioned a back flow, and when the two heavy falls of rain came the water was so obstructed by the dam and the much smaller capacity of the Richmond street sewer than the other, that the water could not properly escape, and being penned back, the plaintiffs' cellar was flooded on both occasions, and damage sustained.

It was to avoid the consequences of any back flow that the engine was suggested, which was afterwards used to raise the water.

And it is with reference to the opening of the Richmond street sewer that Mr. Johnson said:—"There was no mention of Richmond street in the specifications, the diversion of water is implied in the specifications."

And it is to that that the rule applies, that the city engineer's authority "did not extend to make this alteration in or addition to the work."

We must determine, firstly, whether this kind of work—the opening of public highways and the construction of necessary sewers for the health and requirements of the inhabitants of the city—is such a work from which the defendants can relieve themselves from the responsibility of it or from the manner in which it is done, by employing what is called an independent contractor, and taking or reserving no manner of control or right of management or supervision of it.

And secondly, if the city can relieve itself from responsibility by so doing, whether it has so relieved itself in this case.

As to the first question. It is the duty of the defendants to construct such works, and in them is vested the jurisdiction over all highways within the municipality.

In *Overton v. Freeman et al.*, 11 C. B. 867, the defendants took a contract to pave certain streets of a parish. They sub-let the contract to Warren, who did the work. Warren brought stone on to the pathway and left it there unguarded at night in such a manner as to obstruct it, and the plaintiff fell over the pile and broke his leg. Held, that Warren, and not the defendants, were

liable. If the act contracted to be done would itself have been a public nuisance, the defendants would have been liable.

In *Ellis v. The Sheffield Gas Consumers' Co.*, 2 E. & B. 767, it is decided that, although a person employing a contractor is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet if the act itself is wrongful the employer is responsible for the wrong done by the contractor or his servants, and is liable for damage sustained by others.

Lord Campbell, C. J., said at p. 769: "I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself."

In *Hole v. The Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, it was held that the defendants, who had employed a contractor to build a bridge which they were authorized to construct over a navigable river, were liable for that bridge obstructing the navigation; that the company could not transfer their liability to another, and that the contractor had only done that which he was employed to do, and it was that which occasioned the mischief, and so the defendants were responsible.

Martin, B., said the statute required the company to exhibit a light every night on the bridge during its construction, and he continued, p. 499: "Now suppose the company had contracted with a person that he should hang out a light, and the contractor had omitted to do so, is there any pretence for saying that the company would not have been responsible?"

It is stated throughout the case that if the contractor had done something collateral to his contract, from which injury resulted, he, and not the company, would have been liable.

In *Pickard v. Smith*, 10 C. B. N. S. 470, a railway company had let refreshment rooms and a coal cellar at a railway station to the defendant, the opening for putting coals into the cellar being on the arrival platform.

A coal merchant had opened the trap door on the platform to put coals into the cellar, and left it open without

any guard or protection. The plaintiff fell into this cellar opening. Held, the defendant was liable, although it was the coal merchant who had opened the trap, and left it open, because the very act which caused the injury was one which the defendant authorized the coal merchant to do, and because the coal merchant was entrusted by the defendant with the performance of a duty which it was incumbent upon the defendant to do. Williams, J., was of opinion the railway company was also responsible, because the opening was on their platform, and they were bound to keep the approaches to their station safe.

In *Gray et ux. v. Pullen et al.*, 5 B. & S. 970, in Ex. Ch. 981, the defendant Pullen was, under the authority of a local Act, authorized to make a drain from his house in a street into a sewer for general use. The female plaintiff fell into a hole, made by the settling of the filling up in consequence of heavy rains, and was injured.

Held, that as the duty was imposed on the defendant Pullen by statute to do the work, he was not released from liability because he employed a contractor to do it, and the contractor's neglect caused the breach.

From these cases it would appear the defendants are liable for all such works as the opening of streets and the construction of drains and sewers, causing or doing damage to others, although they employ contractors and not their own workmen to perform the work.

It is a duty which is imposed upon them by statute, and they cannot shift their responsibility upon another by means of a contract. So that if the work is badly done and cause mischief the defendants would be liable. If, for instance, the contractor did his work unskilfully, or used bad materials, and damage resulted, the city would be answerable.

Certainly if after the drain was completed and filled over, it was found not to answer, or if from faulty construction it gave way and blocked up the passage through it, and the adjoining cellars were flooded, and property destroyed, the city would plainly be liable. They could not

exonerate themselves by shewing they had employed a skilful independent workman to do the work. If that be so, they must be equally liable during the performance of the work. They would also be liable for omission to guard or light such works, although the contractor had engaged to do it.

It is in fact, if these authorities give the correct rule in such a case as this, the work of the city performed for them by others, and for which they are answerable, and for which they cannot excuse themselves : see, however, *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487. But there is an exception in all such cases. If it is not the work which the contractor has engaged to do, which is the cause of damage, but something done by the contractor collateral to and not under his contract, the body or person exercising statutory powers is not responsible.

As in *Allen v. Hayward*, 7 Q. B. 960, where the clerk to the commissioners was sued for damage caused by a contractor employed to do certain work, he was held not to be liable, because the contractor went outside of his contract and did an act which he had no authority to do, and which alone caused the damage.

And as in *Hole v. The Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, at p. 497, where Pollock, C. B., said :—“Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act—the remedy is against the person who did it.”

If, then, the work which caused the damage was work which the contractors were authorized to do by their contract, the defendants must be liable for it. If it were beyond their contract the defendants will not be liable.

What they did was, to make a dam across the Yonge street sewer to divert the water into the Richmond street sewer. It was necessary and proper the contractors should relieve their excavation from water while they were at work. It must have been contemplated by both parties to the contract. The work could not otherwise have been done.

If the contractors had no right to open the Richmond street sewer by their contract, the defendants, whose sewer was opened, must, as they never objected to it, be taken to have assented to it, as in fact they did.

But it was not the opening of the Richmond street sewer which caused the damage, it was the backing up and damming of the Yonge street sewer, and that, I am of opinion, was plainly within their contract; and that also was seen and approved of, if not expressly directed, by the officers of the city.

The work complained of, and which caused the damage, cannot therefore be considered to have been purely collateral work, extrinsic to the contract, or done by the contractors without the sanction of the city officers.

Then as to the second question: Did the defendants remain in the care, management, direction, and supervision of the work complained of?

I am of opinion they did. It is impossible to read the evidence without seeing the control, direction, and supervision which the officers had over the work and over the contractors.

The decisions relating to the sole liability in general cases are very numerous. I shall refer to only a few of them.

In *Burgess v. Gray*, 1 C. B. 578, 590, Tindal, C. J., said:—"If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done. * * Then, was there no evidence of personal interference on the part of the defendant? The drain was constructed under his order and for his benefit. He it was that applied to the commissioners for leave to break into the sewer; and before the accident, when the defendant, upon being told the rubbish ought to be removed out of the road, he said he

would remove it as soon as he could. This was an admission that he was exercising a dominion over it."

Coltman, J., said, p. 592: "I think there was evidence enough to satisfy this jury that the entire control of the work had not been abandoned to Palmer."

Cresswell, J., speaks to the like effect.

In *Sèrandat v. Saïsse*, L. R. 1 P. C. 152, Sir Edward Vaughan Williams in giving judgment said, p. 167: "Having regard to the nature of the work, and condition of the men employed, it appears to us unreasonable to infer that the appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing. * * *

In other words, we think the evidence does not shew that the general control, direction, and surveillance of the operation was relinquished by the appellant by reason of the agreement he made with the Indians."

In *Pendlebury v. Greenhalgh*, L. R. 1 Q. B. D. 36, at p. 41, Lord Cairns, C. said: "The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except—a most material exception—superintending on behalf of the committee."

In this case it is admitted that while the work was done under independent contractors the work was to be done under the supervision of the city engineer.

There may have been some independence remaining in the contractor in such a case, but it is manifest that the city did not wholly abandon all control and supervision of the work, and on that admission alone the liability of the city is not removed. The evidence shews, however, much more than that admission. There were two inspectors for the city specially appointed to be upon the work during its whole progress, and much more which need not be repeated. And by the contract the city engineer had power, if the contractors did not proceed with the work according to the contract, or to his satisfaction, or to ensure its due completion by the time named, to employ men, buy materials,

and to complete the work at the expense of the contractors.

It is difficult, in the face of all these facts, to say that the city had wholly abandoned the work to the contractors, and that they retained no control and supervision of it. Upon that ground alone the rule should be discharged; but it may be that it should be discharged upon the first ground as well: that the city could not transfer the work, and that it must be assumed that the city was itself doing the work by means of the contractors; and that the damming of the Yonge street sewer was not a work collateral to and without the contract, so as to make the contractors liable and to relieve the city, although we are not obliged, and we will not therefore place it upon that ground.

We discharge the rule, because the work was done under control and supervision of the city.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

MCCREARY V. GRUNDY.

Seduction—Evidence—Right of witness to answer

In an action for seduction witnesses called for the defence testified to having had connection with the girl. The jury were told that these witnesses had a right to refuse to answer such questions: *Held*, a misdirection. *Held* also, that evidence of the girl's general bad character for chastity was improperly rejected.

The defendant being called wholly denied the charge, and the jury having found for the plaintiff, though the verdict was not large, a new trial was granted without costs, on the ground that the defendant might have been prejudiced by the misdirection and rejection of evidence.

THIS was an action brought by the plaintiff for the seduction of his daughter, Catharine McCreary, by the defendant.

The only plea was not guilty.

The case was tried at the last Fall Assizes for the county of Bruce, before D. J. Hughes, Esq., Judge of the County Court of Elgin, sitting for and at the request of Richards, C. J., with a jury.

Catharine McCreary, the plaintiff's daughter, swore that she gave birth to a child on the 27th April, 1875, of which the defendant was the father, and she denied that any other person had connection with her.

Her sister, *Susan Corbett*, was called as a witness, and to some extent corroborated her evidence.

Some letters, said to have been written by defendant, the genuineness of which was disputed, were also put in; but their contents are unnecessary to the decision of the case.

The defendant was then called as a witness for the defence. He swore that he was a married man: had been married for thirteen years, and was the father of six children, and that he never at any time had connection with the plaintiff's daughter.

Isaac Meek, as a witness for the defence, swore that on several occasions, about two years past, in the fall of 1875, he had had connection with the plaintiff's daughter, and that she had accused him of being the father of her child.

Counsel for the defence were prepared to offer evidence of the daughter's general bad character for chastity.

The learned Judge rejected the evidence, and ruled that counsel had a right to prove specific acts of immodesty, but no right to prove her general bad character for chastity, as the plaintiff could not be supposed to come prepared to meet that evidence.

Two other witnesses were also called, who swore that they had had connection with the plaintiff's daughter.

Some witnesses were called in reply.

This closed the testimony.

The learned Judge in his charge to the jury, while commenting on the testimony of the different witnesses, told the jury that Meek and the other two witnesses had a perfect right to refuse to answer questions which might criminate themselves, or have a tendency to bring them into public odium or disgrace.

Counsel for the defendant objected to this portion of the charge.

The jury found a verdict for the plaintiff and \$100 damages.

During Michaelmas term last, November 16, 1875, *C. Robinson*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had between the parties, on the ground that the verdict is contrary to law and evidence, and the Judge's charge, in this, that the evidence and weight of evidence shewed that the defendant was not guilty of the charge made against him in the declaration; and for rejection of evidence by the learned Judge in this, that the learned Judge refused to receive evidence of the general bad character, in regard to chastity, of the girl Catharine McCreary, alleged to have been seduced by the defendant; and for misdirection of the learned Judge in directing the jury that Meek and other witnesses on the trial, who swore that they had connection with the said Catharine McCreary, had a right to refuse to answer whether they had had such connection, and that they ought so to have refused.

During this term, May 20, 1876, *J. Bethune*, Q. C., shewed cause. There was no improper rejection of evidence or misdirection: *Thorpe v. Grier*, 1 U. C. R. 528; *McMahon v. Skinner*, 2 U. C. R. 272. The observations of the learned Judge, even if erroneous, were not the subject of misdirection: *Dougherty v. Williams*, 32 U. C. R. 215; and defendant was concluded by the answers of the girl to the questions put: *McCullough v. The Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610; S. C., 34 U. C. R. 384.

C. Robinson, Q. C., contra. In an action of this kind, where the defence at best is an up-hill fight, the defendant is entitled to have the law correctly laid down by the bench. The learned Judge erred in his views of the law, and defendant was greatly prejudiced thereby: *Taylor on Evidence*, 6th ed., secs. 330, 1297, 1313; *Best on Evidence*, 6th ed., p. 182; *Roscoe's N. P.* 15th ed., 185; *Verry v. Watkins*, 7 C. & P. 308; *Rex v. Martin*, 6 C. & P. 562; *Dodd v. Norris*, 3 Camp. 519; *Garbutt v. Simpson*, 32 L. J. M. C. 186; *Greenleaf on Evidence*, 12th ed., 154, 155.

June 29, 1876. HARRISON, C. J.—Lord Hale in speaking of the crime of rape described it as “An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent.” 1 *Hale P. C.* 635.

Of the cognate action of seduction it may be said it is “An action easily brought, easily proved, and hard to be defended by the party accused, though never so innocent.”

Some persons supposed that by the amendment of the law permitting the defendant in this and other actions to give testimony on his own behalf, there would be less difficulty in the defence of the action for seduction, but apparently the difficulty is thereby increased.

Jurors sometimes out of false sympathy for the weaker vessel (woman) are too prone to believe her testimony, no matter how or by whom contradicted; and when the defendant presumes himself by oath to contradict it he is

often looked upon by jurors not only as a seducer but a perjurer, and made in consequence to pay smart damages.

Such has not been the case here; although the verdict is for the plaintiff the damages assessed are only \$100. But the stigma of a verdict for the plaintiff in such an action remains on the defendant.

I cannot understand such a verdict in such an action. The man who is really guilty of seducing a woman from the path of virtue, should be well punished. If not guilty, he should be acquitted. The law ought not to allow damages to be given for mere acts of prostitution.

The declaration is, that the defendant debauched and carnally knew the plaintiff's daughter, whereby she became pregnant.

It is not simply that the defendant carnally knew, whereby, &c. Some force must be given to the word debauched as used in the declaration, and that word means to corrupt with lewdness, to seduce. In this sense the man who has connection with a prostitute or a wanton, cannot be said to debauch or seduce her. Loss of service is requisite to the maintenance of the action at common law, but it is, I think, a mistake to suppose that loss of service is the only requisite.

There are those who think that the man who has by fraud ruined the virtue of a woman, should be punished in the same manner and to the same extent as the man who by force has connection with a woman.

It is doubtful if such an amendment of the law, even if made, would be any improvement on the existing law.

But without speculating as to amendments of the law, I agree with Mr. Robinson that, considering the difficult nature of the defence in the existing state of the law, the least the defendant can claim is, to have the law correctly unfolded and fairly administered from the bench.

Jurors very properly attribute in all cases great weight to the remarks of the presiding Judge.

On the question of credibility as between particular witnesses or particular classes of witnesses, the remarks of the Judge are watched by jurors with peculiar interest.

Little said by the presiding Judge, when the minds of the jurors are on the balance owing to conflicting testimony, will turn the scale in favour of the one party or the other.

If the witnesses for the defence in this case were unreliable, the verdict was rightly found for the plaintiff, and the jury might well have rendered a much larger verdict.

If these witnesses voluntarily published their own shame, when they might have refused to do so, I can well understand jurors saying such men are unworthy of belief.

The learned Judge told the jury that these witnesses had a perfect right to refuse to answer questions tending to disgrace them, and from this it is argued that the jury drew the inference that they were unworthy of credit.

The law as laid down by the learned Judge on this point, is challenged by Mr. Robinson with his usual ability.

The question raised is one of general interest, and by no means free from doubt.

The right to put a question to a witness tending to degrade him, though at one time doubted, cannot, when put in good faith, be now seriously questioned. See *Highfield v. Peake*, M. & M. 109; *Fisher v. Ronalds*, 12 C. B. 762; *Osborn v. The London Dock Co.*, 10 Ex. 698; *Tupling v. Ward*, 6 H. & N. 749; *Bartlett v. Lewis*, 12 C. B. N. S. 249; *Baker v. Lane*, 3 H. & C. 544; *Bickford v. D'Arcy*, L. R. 1 Ex. 354; *McKenzie v. Clark*, 4 P. R. 95; *Edmunds v. Greenwood*, L. R. 4 C. P. 70; *Villeboisnet v. Tobin et al.*, 1b. 184; *Inman et al. v. Jenkins*, L. R. 5. C. P. 738; *Greenfield v. Reay*, L. R. 10 Q. B. 217; *Hare* on Discovery, 130.

The obligation of the witness to answer when the question is relevant to the issue in the cause cannot now be doubted: 2 *Phill.* on Evidence, 10th ed. 493, 494; *Taylor* on Evidence, 6th ed., sec. 1313.

But the doubt arises when the question relates to matters collateral to the issue, and is only put in order to test the credit or standing of the witness.

The arguments for and against the obligation in the last supposed case are well put, in 2 *Phill.* on Evidence, 10th ed. 494.

That learned writer says, the advocates for a compulsory power in cross-examination might argue that as parties are frequently surprised by the appearance of a witness unknown to them, or if known entirely unexpected, without such power they would have no means of ascertaining what credit is due to the testimony: that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must be often endangered.

Those on the other side, who maintain that a witness is not compellable to answer such questions, may contend to the following effect: They say the obligation to give evidence arises from the oath which every witness takes, that by this oath he binds himself only to speak of the matters in issue, and that such particulars as these—whether the witness has been in gaol for felony or suffered some infamous punishment or the like—cannot form any part of the issue, as appears evident from this consideration, that the party against whom the witness is called would not be allowed to prove such particular facts by other witnesses. They may argue further, that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report and obloquy, when perhaps by subsequent conduct he may have obtained the good opinion of the world.

The opinions of learned Judges *pro* and *con* on the general question up to 1852 will be found collected from p. 485 to 503 of 2 *Phill.* on Evidence, 10th ed.

In *Rex. v Hodgson*, R. & R. 211, it was held on an indictment for rape, that the woman is not compellable to answer whether she had connection with other men or with a particular person named.

In *Rex v. Clarke*, 2 Stark. 241, Holroyd, J., said, at p. 244: "In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed com-

mission of the offence is admissible; but the defendant cannot go into evidence of particular facts."

In *Rex v. Barker*, 3 C. & P. 589, Park, J., on an indictment for rape, followed the law as laid down by Holroyd, J., in *Rex v. Clarke*, 2 Stark. 241. "

In *Rex v. Martin et al.*, 6 C. & P. 562, Williams, J., who had been one of the counsel in *Rex v. Hodgson*, said he never could understand that case, and observed, at p. 563, "The doctrine, that you may go into general evidence of bad character in the prosecutrix, and yet not cross-examine as to specific facts, I confess does appear to me to be not quite in strict accordance with the general rules of evidence."

In *Rex v. Cockroft*, 11 Cox 410, Willes J., said, at p. 411, "You may cross-examine the prosecutrix with respect to particular acts of connection with other men, but if she denies them, you are bound by the answer."

The decision of Willes, J., was affirmed by the Court of Criminal Appeal, in *Regina v. Holmes*, L. R. 1 C. C. 334.

The result of the authorities appears to be, that on an indictment for rape or indecent assault, the question may be put as to connection with other men, and must be answered, but that the answer is conclusive and cannot be contradicted by calling witnesses for the defence.

It may be, that where, instead of a prosecution for rape, an action is brought for the recovery of damages for alleged seduction, a different rule applies.

In *Dodd v. Norris*, 3 Camp. 519, in an action for seduction, Lord Ellenborough ruled, that the daughter was not bound to answer on cross-examination whether she had not previously been criminal with other men, "and that the point having been referred to the Judges, they were all of the same opinion."

But in *Verry v. Watkins*, 7 C. & P. 308, which was an action for seduction, after evidence was given of the general bad character of the plaintiff's daughter in respect of chastity, Phillips, counsel for the defendant, expressed a doubt whether he ought to ask as to particular acts of unchastity.

And Alderson, B., said, p. 309, "I am clearly of opinion you may ask the question." Evidence was then given of several acts of sexual intercourse with the plaintiff's daughter by two different witnesses for the defendant, who each deposed to the fact, the time, and the place.

Talfourd, Serjeant, in reply, as usual in such a case, contended that the witnesses for the defence were not worthy of belief.

Alderson, B., in charging the jury, said: "If you think the defendant had such intercourse with the daughter of the plaintiff as caused him to be the father of the child of which she gave birth, your verdict must be for the plaintiff; and the case then comes to a question of damages; in which view, and in which view alone, you will consider what reliance you ought to place on the evidence adduced on the part of the defendant." There was a verdict for the plaintiff, and only £5 damages.

In *McMahon v. Skinner*, 2 U. C. R. 272, which also was an action for seduction, the female seduced swore that she never had criminal intercourse with any other than the defendant, and on the defence the defendant wished to ask each of his witnesses whether he had not had such intercourse with her, but the learned Judge would only permit him to ask whether to their own knowledge that statement of the girl was not true, and they swore it was not. The Court on a motion for a new trial, on the ground of rejection of evidence, held that the evidence was only received to the extent that it ought to have been, and discharged the rule.

No objection was made to the admissibility of the testimony of the witnesses for the defence in the case before us.

The only question is, whether the learned Judge, having received their testimony without objection, erred in telling the jury that the witnesses were not bound to answer.

The latest exposition of the law on the point is that to be found in section 1314 of *Taylor on Evidence*, vol. ii., 6th ed. He says: "Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character, and consequent credit of the witness, there is

much more room for doubt. Several of the older dicta and authorities tend to shew, that in such a case the witness is not bound to answer; but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times. Even Lord Ellenborough, who is reported to have held on one occasion that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him, seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his lordship harshly observed, 'If you do not answer that question, I will send you there.' No doubt cases may arise, where the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance."

Best, in his work on Evidence, 6th ed., 185, after reviewing the cases, says: "It seems, indeed, that, in strictness, the Court can compel a witness to answer under such circumstances, although in the exercise of its discretion it will not do so, unless the ends of justice clearly require it. But this seldom happens; as the object of the cross-examining party is, in general, sufficiently attained by putting the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession."

The weight of modern authority and of modern text-writers is, I think, against the ruling of the learned Judge, who tried this cause.

In this connection I must consider the complaint that the learned Judge rejected evidence of the daughter's bad character for chastity.

Such evidence is properly admissible on an indictment for rape: *Rex v. Barber*, 3 C. & P. 589, and per *Kelly*, C. B., in *Regina v. Holmes*, L. R. 1, C. C. 334; and much more ought it to be received in an action by a father for the alleged seduction of his daughter. If her character be such that she be proved to be a wanton or a prostitute, the damages,

if any, should be much less than if she be proved to be a woman of respectable deportment and decent conduct.

Hence it is said in section 330 of *Taylor* on Evidence, 6th ed.: "It has been above observed that in some cases general evidence of character is admissible, for the purpose of increasing or diminishing the amount of damages. Thus evidence impeaching the previous general character of the wife or daughter in regard to chastity, is admissible under the general issue, on a petition by the husband on the ground of adultery, or in an action by the father for seduction; for in these proceedings the plaintiff in reality seeks compensation for the pain which the defendant has caused him to suffer, by disgracing his family, and ruining his domestic happiness; and it is manifest that, such being the true nature of the claim, though in cases of seduction not the ostensible ground of action, the damages should be commensurate with the pain, which will vary according as the character of the wife or daughter has been previously unblemished or profligate. In these cases, therefore, not only evidence of general bad character is admissible in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum."

In such a case it is open to the plaintiff to call evidence in reply for the purpose of rehabilitating the character of his wife or daughter; *Bamfield v. Massey*, 1 Camp. 460; *Bate v. Hill*, 1 C. & P. 100; See further, *Jones v. James*, 18 L. T. N. S. 243.

I feel not the shadow of a doubt in holding that the learned Judge who tried the cause, erred in rejecting the evidence of general bad character for chastity.

The hesitation I feel is, in granting relief in a case where the misdirection or rejection of evidence complained of, as here, apparently affects only the quantum of damages, and where the amount of damages assessed, notwithstanding the misdirection or rejection of evidence, is small.

The defendant who, in such an action, with a verdict so small as \$100, asks for a new trial, runs a great risk. Next trial, should a new trial be granted, there may be

no misdirection, no rejection of evidence, and yet a verdict for the plaintiff in an amount larger than the present verdict.

The risk in such a case is entirely that of the defendant. Should there be a larger verdict against him than the present verdict, and no misdirection or rejection of evidence, there will, in all probability, be no further relief for him.

I cannot say that the defendant in this case has had such a fair trial as he was entitled to have, owing to what I take to be—and I say it with all possible respect—the errors in law of the learned Judge who tried the cause; and for that reason, and considering the uphill nature of the defence in such an action, with some misgiving as to the result, have concluded, if defendant desire, it to make absolute the rule for a new trial without costs.

MORRISON, J., concurred.

WILSON, J., was not present at the argument and took no part in the judgment.

Rule absolute. (a)

(a) On a second trial the jury found for defendant, and the verdict was not moved against.

THE TRUST AND LOAN COMPANY OF UPPER CANADA V.
HENRY COVERT AND HENRY JAMES RUTTAN.

Covenant for quiet enjoyment—Costs of defending suit—Right to recover.

The defendants having conveyed land to T. with full covenants, T. mortgaged to the plaintiffs. The children of T. filed a bill in Chancery against the plaintiffs and others, under which a decree was made directing the plaintiffs to convey the land to the plaintiffs named in the bill, who shewed a good title as against both plaintiffs and defendants herein; and the plaintiffs thus lost the land, and were obliged to pay their own and the plaintiffs' costs in the suit in Chancery.

The plaintiffs thereupon sued the defendants upon the covenant for quiet enjoyment contained in their deed to T: *Held*, that they were entitled to recover all the costs incurred by them in defending the Chancery suit, either as between party and party, or as between attorney and client, it not appearing upon the evidence that such costs were either needlessly or unreasonably incurred.

THIS was an action to recover damages for a breach of the covenant for quiet enjoyment.

The declaration and subsequent pleadings will be found reported in 30 U. C. R. 239.

The principal facts in the case will be found in 32 U. C. R. 222, where the Court held the plaintiffs entitled to recover, but ordered a new trial, as no damages had been assessed.

The damages were assessed at the Spring Assizes for 1875, before Richards, C. J., without a jury.

The deed, dated on the 22nd of June, 1855, from the defendants to Henry Huddleston Thompson, with full covenants for title, was proved.

The mortgage, dated on the 10th of April, 1855, from Henry Huddleston Thompson to the plaintiffs, was also proved: it was subject to a proviso for redemption on payment of £450.

The pleadings in the case in Chancery of *Thompson v. Thompson* were also proved.

It was proved by the plaintiffs that the amounts they had paid in connection with the mortgage and the Chancery suit were as follow:—

Insurance of buildings.....	\$123 70
Costs paid in <i>Thompson v. Thompson</i> , on 28th November, 1868.....	\$258 00
Messrs. Thompson's costs paid on 9th December.	49 94
	<hr/> 307 94
The company's costs.....	626 60
	<hr/>
The amount due on the mortgage for principal was proved to be.....	\$1800 00
Interest from 1st October, 1855, to 1st April, 1875, at 8 per cent.....	2808 00
	<hr/>

The defendants contended, among other things, that they were only liable for the amount of the mortgage, and interest at 6 per cent.

The learned Chief Justice held that the plaintiffs were entitled to recover as follows:—

Mortgage debt.....	\$1800 00
Interest	2808 00
Insurance money	123 70

Total..... \$4731 70

And rendered a verdict for that amount. He assessed the amount of costs as between party and party in the Chancery suit at \$307.94, and reserved leave to the plaintiffs to move to increase the verdict by that amount, if the Court should think the plaintiffs entitled thereto. He did not see his way clear as to the \$626.60, the plaintiffs' costs, as between attorney and client, and made no assessment as to it.

During Easter term, May 22, 1875, *F. Osler*, obtained a rule calling on the defendants to shew cause why the verdict should not be increased by the sum of \$934.54, being the aggregate amount of costs.

During Hilary term, February 23, 1876, *J. D. Armour*, Q. C., shewed cause. He cited *Hodgins v. Hodgins*, 13 C. P. 146; *Hunter v. Johnson*, 14 C. P. 123; *Eccles v. Lowry*, 34 U. C. R. 75; *Baxendale v. London, Chatham, and Dover R. W. Co.*, L. R. 10 Ex. 35.

F. Osler, contra, cited *Mayne* on Damages, 2nd ed., 145; *Rawle* on Covenants, 4th ed., 305; *Brennan v. Servis*, 8 U. C. R. 191; *Clark v. Robertson*, *Ib.* 370; *Graham v. Leslie*, 4 C. P. 176; *Stubbs v. Martindale*, 7 C. P. 52; *Forsyth v. McIntosh*, 9 C. P. 492; *Rolph v. Crouch*, L. R. 3 Ex. 44; *Collen v. Wright*, 8 E. & B. 647.

May 15, 1876. HARRISON, C. J.—The declaration (a) alleges that defendants by deed conveyed certain land in fee to one Henry Huddleston Thompson, and covenanted with Thompson, his heirs and assigns, that it should and might be lawful for him, his heirs and assigns, peaceably and quietly to enter into and have, hold, use, possess, occupy, and enjoy the said land without the let, *suit*, hindrance, interruption, or denial of the defendants or any other person or persons whomsoever.

It then alleges a transfer by deed of the land from Thompson to the plaintiffs.

It next, in effect, avers as a breach of the covenant that certain persons, children of Thompson, to whom good title as against the plaintiffs and the defendants, and not derived from either of them, had accrued, filed a bill in the Court of Chancery against the plaintiffs, the defendants, and others, praying, among other things, that the deed from the defendants to Thompson, and from Thompson to the plaintiffs, should be delivered up to be cancelled, and the plaintiffs ordered to convey the land named in the bill; and such proceedings were thereupon taken in such suit that, on the 14th of November, 1867, a decree was made according to the prayer of the bill; *per quod* the plaintiffs have not only lost and been deprived of the land, but were obliged to pay the costs and charges sustained by the plaintiffs in the Chancery suit, and were compelled to pay a large sum in and about defending the Chancery suit.

It was at one time doubted whether a suit in equity was a breach of the old form of covenant for quiet enjoyment: *Selby v. Chute*, 1 Brownlow 23; and in consequence the

(a) The declaration is set out in 30 U. C. R. 239, *et seq.*

covenant was extended to cover suits in equity: *Shep. Touch.* 166, by Preston; 2 *Sug. V. & P.*, 14th ed., 600; and there is now no doubt that a decree in equity is a breach of the ordinary covenant for quiet enjoyment: *Hunt v. Danvers*, Sir T. Raym. 370; and this was the point determined in favour of the plaintiffs in this cause when this case was before the Court on demurrer: 30 U. C. R. 239.

It is equally clear as a proposition of law that the covenant for quiet enjoyment is one that may be taken advantage of by the assignee of the covenantee being the assignee by deed of the land: *Rawle on Covenants*, 4th ed., ch. 8.

The breach alleged being proved, the only question which now arises for decision is, as to the right of the plaintiffs to recover the amount of the costs paid to the plaintiffs in the Chancery suit and their own costs of defending that suit, or either of these amounts.

In *Rawle on Covenants*, 4th ed., p. 304, it is said: "It not unfrequently happens that a purchaser is reluctant to abandon his purchase to a paramount claimant without a struggle. * * * So far as the taxed costs of suit are concerned, the rule is settled that it would be expecting too much of a purchaser to decide at his peril on the validity of a title set up in opposition to that which his vendor undertook to convey. The former should be allowed, by way of damages, the taxed costs of any action by which he has reasonably sought to maintain or defend that title," &c.

The well known case of *Smith v. Compton*, 3 B. & Ad. 407, which was an action for breach of covenant for good title, if still law, not only sustains the proposition of Mr. *Rawle*, but decides that the plaintiff is also entitled to recover his costs of defence as between attorney and client.

Lord Tenterden said, at p. 408: "As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."

The case is also important as deciding that the recovery of costs may be had although no notice be given to the covenantor of the pending suit, for the reason that the only

effect of not giving such notice is to let in proof that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged.

Although Mr. *Mayne*, at p. 45 of the second edition of his work on Damages, has doubted *Smith v. Compton*, by saying: "It may be a question whether, upon the facts of the particular case, the same decision would be arrived at again." I do not find that any Court or Judge has in any manner disapproved of the decision.

On the contrary, in *Brennan v. Servis*, 8 U. C. R. 191, which was an action on covenant for good title, *Smith v. Compton* was followed to the fullest extent, and without doubt or question.

In *Clark v. Robertson*, 8 U. C. R. 370, 372, a similar action Robinson, C. J., said: "I discouraged any allowance for the costs of the ejectment by which the plaintiff had been dispossessed; though I am satisfied now that she was entitled to them, as Mr. Prince contended, if entitled to damages at all. *Smith v. Compton*, 3 B. & Ad. 407, is authority on that point."

In *Stubbs v. Martindale*, 7 C. P. 52, 54, which was also an action on a covenant for good title, Richards, J., said: "We do not feel warranted in considering *Smith v. Compton* bad law, until it is expressly overruled."

And while the authority of *Smith v. Compton* was expressly recognized by Draper, C. J., in *Forsyth et al. v. McIntosh*, 9 C. P. 492, 495, an action for breach of the covenant of seizin, the costs of the arbitration in that case were disallowed, because they were the consequence of the plaintiffs' own needless act.

The costs were disallowed in *Parker v. McDonald*, 11 C. P. 478, an action for breach of the covenant for right to convey, because, under the peculiar circumstances of that case, they could not be said to be "the natural and direct consequence of the defendants' breach of covenant."

The decision was similar in *Hodgins v. Hodgins*, 13 C. P. 146, which was an action on the covenant for quiet enjoyment, and for a similar reason.

In *Parker v. McDonald*, 11 C. P. 478, the plaintiff was told by his legal adviser, that there was no defence to the suit; and in *Hodgins v. Hodgins*, 13 C. P. 146, he knew there was no defence, and yet in each case costs were needlessly incurred, and so disallowed.

In *Stuart v. Mathieson*, 23 U. C. R. 135, which was an action on the covenant for quiet enjoyment, *Smith v. Compton* was assumed to be "good law," and "as there was no evidence either one way or the other as to whether the plaintiff needlessly or reasonably incurred the costs," the plaintiff was held entitled to recover the costs as part of his damages.

In *Hunter v. Johnson*, 14 C. P. 123, which was an action for breach of the covenant for quiet enjoyment, it was proved that the defence was wholly needless, and that the plaintiff knew it; and so, on the authority of *Hodgins v. Hodgins*, 13 C. P. 146, the costs were disallowed.

In *Spence v. Hector*, 24 U. C. R. 277, which was an action by a lessee against his assignee on a covenant to indemnify lessee against the covenants in a lease, costs of resisting a suit for breach of the covenant were allowed as part of the damages.

The latter case was approved and followed in *Maybee v. Turley*, 27 U. C. R. 444.

In the case of *Wallace v. Gilchrist*, 24 C. P. 40, 51, which was an action by the plaintiff as the assignee of a bond, the language of Lord Tenterden, in *Smith v. Compton*, was quoted, approved, and followed. See also *Eccles v. Lowry*, 35 U. C. R. 75.

The most recent decisions in England, so far as applicable, are in accord with the decisions of our own Courts in approval of the doctrine laid down in *Smith v. Compton*.

In *Rolph v. Crouch*, L. R. 3 Ex. 44, where the defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the said defendant, his executors * * * or any other person or persons lawfully claiming by, from, or under him

or them," and an action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff, which the latter unsuccessfully defended, it was held that the plaintiff was entitled to recover from the defendant, not only the damages and costs he had paid, but the expenses he himself had incurred in defending the suit.

So in *Howard v. Lovegrove*, L. R. 6 Ex. 43, which, like *Spence v. Hector*, 24 U. C. R. 277, was an action by a lessee against the assignee of the lease for breach of a covenant to indemnify against the covenants contained in the lease, it was held that the plaintiff was entitled to recover not only the costs paid by him on taxation, but the costs paid by his own attorney in unsuccessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment. The action was brought to recover the sum of £30 paid into Court by the plaintiff in the action against him, and the costs to which the plaintiff had been put in defending that action. A verdict was found for the plaintiff for £72 16s. 10d., of which £12 9s. 6d. consisted of costs which had not been allowed on taxation between party and party, but had been paid by the plaintiff to his own attorney for services rendered in the defence of the action against him.

Kelly, C. B., in delivering judgment, said, p. 44: "Then there are the costs incurred in defending the action, as to which the question before us arises. It is said that the defendant cannot be made liable for more than such costs as the Master allows on taxation. But I am of opinion that all the costs the plaintiff incurred, both those allowed as between party and party, and also those properly incurred in addition between himself and his own attorney, were necessarily incurred. This being so, it would be unjust, and we should not give its full effect to the contract of indemnity entered into with him by the defendant, if we were to deprive him of these extra costs."

Martin, B., said, p. 45: "To give him the mere costs as taxed by the Master, who acts according to a particular scale, would not be a complete indemnification."

Piggott, B., said, p. 45: "From first to last he (plaintiff) did nothing unnecessary, and these costs, both taxed and extra, appear to me the natural and necessary consequence of the defendant's breach of contract, and to be recoverable, as coming within the strict rule as to the mode in which damages should be measured."

In *Mors-Le-Blanch v. Wilson*, L. R. 8 C. P. 227, an attempt was made—and in the particular case, on the authority of a dictum of Parke, B., in *Tindall v. Bell*, 11 M. & W. 228, 231, successfully made—to extend the principles of the foregoing cases to a case where the plaintiffs complained that in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames in a ship called the *Pitho*, a large quantity of coals, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants, or their assigns, on certain terms, the defendants promised that the coal should be taken, by the defendants or their assigns, from the ship as soon as the master was ready to deliver; and it appeared that on the arrival of the ship at her place of destination, she was detained several days. For this detention the ship owners brought an action against the plaintiffs, and put the plaintiffs to a large amount of costs in defending the suit.

But in *Baxendale v. London, Chatham, and Dover R. W. Co.*, L. R. 10 Ex. 35, where a similar attempt was made to extend the doctrine to a case, where one Harding, having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, and the plaintiffs contracted with the defendants for the carriage of the pictures a part of the distance, the pictures were damaged on the journey through the negligence of the defendants, in consequence of which Harding sued the plaintiffs and put them to costs, the attempt failed—and *Mors-Le-Blanch v. Wilson* was disapproved.

The true distinction between *Mors-Le-Blanch v. Wilson* and *Howard v. Lovegrove*, L. R. 6 Ex. 43, and similar cases which I have cited, was taken by Quain, J., who said, p. 44:

"If this were a contract of indemnity where, although there may be two contracts in form, there is only one in substance, our decision might be in favour of the plaintiffs. *

* * The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here, for we have to deal with two separate and independent contracts," &c.; and by Archibald, J., who said, p. 45: "These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts were wholly independent, and the damages recovered against the plaintiffs * * were not of necessity the same as those which the plaintiffs could recover against the defendants," &c.

The remaining Judges rested their decision on the broad ground that in the particular case the defence of the suit by the plaintiffs was needless, hopeless, and unreasonable.

The covenant for quiet enjoyment, although it does not always contain the word "indemnify," for purposes of damages, partakes of the character of a covenant of indemnity. See *Rawle* on Covenants, 4th ed., ch. 5; and *Platt* on Covenants, part iii. ch. 11; *Harry v. Anderson*, 13 C. P. 476; *McClure v. Grafton*, 19 C. P. 149.

The plaintiffs, as assignees of the covenantee, have, according to the great preponderance of authority, the right to claim indemnity from the defendant, the covenantor, and unless the costs can on the evidence be said to have been needlessly and unreasonably incurred, the plaintiffs have the right to claim these costs as a portion of their damages.

I am unable to say on the evidence that the costs were either needlessly or unreasonably incurred.

It appears to me on the facts that the case falls more within the authority of *Stuart v. Mathieson*, 23 U. C. R. 135; *Spence v. Hector*, 24 U. C. R. 277, and *Howard v. Lovegrove*, L. R. 6 Ex. 43, than within the authority of

Forsyth v. McIntosh, 9 C. P. 492; *Parker v. McDonald*, 11 C. P. 478; *Hodgins v. Hodgins*, 13 C. P. 146; *Hunter v. Johnson*, 14 C. P. 123.

The plaintiffs therefore are entitled to recover all the costs which can be properly said to have been incurred in the defence of the Chancery suit. These are the costs as between party and party, and the costs between attorney and client. The amount of the costs between party and party was found by the learned Chief Justice to be \$307.94. The rule must, at all events, be made absolute to increase the verdict by that amount. The learned Chief Justice did not find the amount of the costs between attorney and client. This being so, there must be a reference to the Master to ascertain that amount, and the verdict be further increased by that amount when ascertained by the Master.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule absolute.

SOULES V. DOAN.

Coverture.

In an action for assault brought by a married woman, the coverture, if not pleaded, forms no ground of objection to the verdict.

THIS was a case tried at the Toronto Fall Assizes, before Galt, J.

The declaration contained a count for trover, one for assault, common money counts, and two counts for a wrongful dismissal from defendant's service.

Pleas: To first and second counts, not guilty; and to the first count, goods not the plaintiff's: to the common counts, never indebted and payment: to the fourth and fifth counts, did not promise, and also justifying discharge from service on account of disobedience and dishonesty, &c.

A verdict was rendered for the defendant on the plea of not guilty to the first count, and for the plaintiff on the second count, with \$50 damages, and for the plaintiff on the other counts and \$50 damages.

At the close of the plaintiff's case, it having appeared in the evidence that the plaintiff was married, the defendant's counsel contended that the plaintiff could not recover, as her husband was not joined, and leave was reserved to move on that ground as to the verdict on the count for the assault.

In Hilary term, February, 9, 1875, *J. K. Kerr* obtained a rule to set aside the verdict for the plaintiff on the issues to the second count, and to enter it for the defendant on these issues, and to reduce the amount of the verdict by the amount of the damages under the second count pursuant to leave reserved.

During this term, May 30, 1876, *A. Boulbee* shewed cause. It is not necessary that the husband should be joined, the action being for the personal injury—the personal suffering she endured. The misjoinder can only be raised by plea in abatement.

J. K. Kerr, Q. C., supported the rule, and cited *Hunter v. Ogden*, 31 U. C. R. 132, and cases there collected. *Chitty* on Pleading, 7th ed., vol. i., 464; *Com. Dig.* "Baron & Feme," vol. ii., 247; *Boggett v. Frier*, 11 East 301; *Hilliard* on Torts, 3rd ed., 2, 501; *Chambers v. Donaldson*, 9 East 471; *Weald v. Pease*, Cro. Jac. 355; *Dix v. Brookes*, 1 Str. 61; *Bishop* on Married Women, sec. 913; *George v. Skivington*, L. R. 5 Ex. 1; *Metropolitan R. W. Co. v. Wilson*, L. R. 5 C. P. 376.

June 29, 1876, MORRISON, J. The question raised on this rule is, whether the plaintiff is entitled to hold the verdict on the second count for the assault on her, as it appeared at the trial she was a married woman, and no plea of coverture on the record; and we are of opinion that she is.

Mr. *Chitty*, in his work on Pleading, 7th ed., vol. i, 464, says, when the wife is legally interested and might properly join with her husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue, or pleaded in bar. At least this rule obtains in actions for torts, and it is so laid down in *B. & L. Prec.*, 3rd ed., 171; and in *Dalton v. Midland R. W. Co.*, 13 C. B. 474, where the wife, the plaintiff, sued alone, and on her examination at the trial it turned out she was married; objection to her recovering was taken, and leave reserved as here to enter a verdict against her. After argument the rule was discharged, the Court holding that it being a cause of action which might be unobjectionably put in suit by her and her husband properly, and that being so, it was plain that the misjoinder of the husband was only matter for a plea in abatement.

And in a later case, *The Metropolitan R. W. Co. v. Wilson*, 6 L. R. C. P. 376, the plaintiffs in error had assigned as error in fact the coverture of the defendant who had recovered for injuries sustained by her. There it was held that such a ground of error cannot be assigned. The question of coverture is discussed, and Willes, J., in the course of his judgment, says: "It seems clear, therefore, that in the

case of a married woman suing as a *feme sole*, the defendant, if he do not plead the coverture, is bound by the judgment."

The rule must be discharged.

WILSON, J., concurred.

HARRISON, C. J., was not present at the argument, and took no part in the judgment.

Rule discharged.

RE DARLING.

Subpœna from L. C.—Consol. Stat. C. ch. 79—Non-attendance.

Where a subpœna issued under Consol. Stat. C. ch. 79, out of the Superior Court of Lower Canada, had not the statement or notice required by sec. 7. *Held*, that the witness could not be punished, under sec. 8, for non-attendance.

Held, also, that in this case, on the facts set out below, it sufficiently appeared that the witness was a resident of Toronto. *Semble*, also, that payment of conduct money to the witness was sufficiently shewn, the money appearing to have been paid with a previous subpœna also disobeyed.

IN Hilary term, February 12, 1876, *Bowes* obtained a rule *nisi* calling on Henry William Darling to shew cause why an attachment should not issue against him for contempt in disobeying a subpœna issued out of the Superior Court of Lower Canada, district of Montreal, commanding his attendance at the trial of a cause pending in such Court to be holden at the city of Montreal, of *Brown et al. v. Darling et al.*

It appeared that a subpœna *duces tecum*, issued out of the Superior Court, Montreal, was duly served on Henry W. Darling commanding him to attend, &c., the trial of a cause pending in said Court on the 3rd day of December last, in which the witness Darling was a defendant. The subpœna was alleged to be issued under the authority of Consol. Stat. C., ch. 79. Attached to the subpœna was a certificate under the seal of the Superior Court of Montreal, and signed by the Hon. Mr. Justice McKay, a Judge of the Court, entitled in the case of *Brown et al. v. Darling*

et al., certifying that Henry W. Darling, named in the subpoena, was duly called at the trial of the said cause on the 3rd of December, 1875, and that he made default to appear according to the exigency of the subpoena, which according to the affidavit attached thereto was served on said Darling on the 25th of October, personally; and it was further certified that such default was duly recorded at the time Darling was called, and that the certificate was transmitted by the said Court to any of Her Majesty's Courts of law or equity in Ontario where the said Darling might reside, under the provisions of and for the purposes stated in the 8th section of Consol. Stat. C., ch. 79.

There was also an affidavit of one Andrew Darling, setting forth that the witness Darling was a material witness in the cause in question. The affidavit was not entitled in any Court or cause, but merely headed, "Province of Quebec, District of Montreal," and was sworn before a commissioner as stated, under Consol. Stat. C., ch. 79.

No affidavit was filed shewing that any conduct money, or that the necessary expenses were paid or tendered the witness when the subpoena in question was served on Darling. There was a statement, however, on the face of the subpoena, as follows: "And inasmuch as your attendance under former subpoenas served on you never was had, the tender already made to you, under such previous subpoena of \$30 currency for travelling expenses, avails under this subpoena.

During this term, June 1, 1876, *McCarthy*, Q.C., shewed cause.

Bowes supported the rule.

The arguments sufficiently appear in the judgment.

June 29, 1876. MORRISON, J.—It was contended on the argument that the materials upon which the motion was granted and the facts appearing were insufficient, and that it did not appear that the witness was a resident without the jurisdiction of the Superior Court of Montreal. I think it sufficiently appears from the subpoena and the papers filed

that the witness was a resident of Toronto; he is styled so in the subpoena. It would have been better if the affidavit of service sworn to in Toronto had specifically stated the fact, but it does appear by the affidavit of a previous subpoena issued from the same Court, and in the same cause, that the witness Darling resided at No. 380, Jarvis street, city of Toronto.

It was also objected that no conduct money was paid or tendered. Upon an application of this nature it is clearly necessary to shew that reasonable and necessary expenses were paid or tendered to the witness.

The 9th section of Consol. Stat. C., ch. 79, prohibits this Court from punishing a witness for neglecting or refusing to attend in obedience to such a subpoena unless it be made appear to the Court transmitting, and also to the Court receiving the certificate above referred to, that a reasonable and sufficient sum of money, &c., to defray the expenses of going and attending to give evidence and returning had been tendered to such witness at the time when the subpoena was served upon him.

We may assume, although it is not stated in the certificate, that it was made to appear to the Superior Court that the conduct money was tendered or paid to the witness. It does not, however, appear to this Court by any affidavit that at the time of the service of this subpoena such expenses were paid or tendered to the witness. It does appear, if we can look at another subpoena, not a subpoena *duces tecum*, and the affidavit of service thereof served on the 27th August, 1875, to attend the trial of a cause between the same parties in the same Court, on the 1st of October last, that the witness Darling was paid at the time of the service of that subpoena \$30 as conduct money.

There is no affidavit filed entitled in this matter as to the payment of the \$30 and the circumstances under which it was paid, nor does it appear by affidavit that the witness did not attend on the day mentioned in the previous subpoena, or that the latter was issued in the same cause as the subpoena in question. For all that appears the witness may have attended, and the causes may be different actions.

In the subpoena now in question, as I have above mentioned, there appears the statement of the witness not having attended on former subpoenas, (for there is a third subpoena, filed with an affidavit of service, for the 18th October, 1875, with nothing stated about conduct money), and that \$30 previously paid would avail or apply to the subpoena before us. I am inclined to think that sufficient is shewn from which it may be inferred that the \$30 was paid the witness on the 3rd of September and that he did not attend in obedience to it, and that it was not expended by him; and although the statute says such expenses must be tendered at the time of the service of the subpoena which is disobeyed, and for such default the Court is asked to punish him, still, if it appears that the conduct money was paid previously, it would be a payment within the intention of the statute.

It was, however, also objected that the subpoena was not properly issued, and that the statement *or notice required* by the 7th section of the statute does not appear on the subpoena.

That section is as follows: "Every such writ (of subpoena) shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order."

The 4th section provided that any of the Superior Courts or any Judge thereof, where a witness is not within the jurisdiction of the Court, may, in their discretion, order that a writ of subpoena, &c., shall issue in special form commanding the witness to attend, &c.

The Legislature, I assume, by the provision contained in the 6th section intended that the witness should be informed and notified that the subpoena was a special one issued under the authority of the statute, ch. 79, and that unless the notice or statement required by the 6th section appeared on its face, he was not bound to attend.

It seems to me that the jurisdiction given to the Court by the 8th section to punish a witness so making default,

can only be exercised when it appears to the Court that the subpoena was one properly issued, and contained the notice or statement which the Act imperatively directs, and requires of its issue by the 'special order of the Court out of which it issues, or a Judge thereof ;' and upon this ground of objection I am of opinion we must refuse the rule for an attachment.

The rule will therefore be refused with costs.

HARRISON, C. J., and WILSON, J., concurred.

Rule discharged.

LEWIS V. THE CORPORATION OF THE CITY OF TORONTO.

Refuse deposited in street—Liability of city corporation—City commissioner.

Under the orders of the city commissioner of the City of Toronto, large quantities of rubbish and offal, offensive and injurious to health, were during the summer deposited in a lane adjoining the plaintiff's cottages, by which the lane was raised three or four feet, coming up to the windows, and the filth ran over into the basement; the well attached to the houses was rendered unfit for use, so that the plaintiff was compelled to dig a new one, and he had also to raise one of the houses, and remove the kitchen, to suit the level of the lane; his tenants refused to remain, and he was obliged to lower the rent.

Held, that the defendants were liable for the acts of the commissioner, without any by-law being shewn; but that the expense of raising the house and removing the kitchen could not be recovered.

When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. Remarks as to the form of the second count in this case.

The power given by sec. 425, sub-sec. 1, of the Municipal Act of 1873, to improve, repair, widen, and alter streets, includes the power when necessary for these purposes to level, raise, or lower the streets.

THIS was an action for the recovery of damages.

The first count of the declaration alleged that the defendants wrongfully caused divers offensive and pestilential stenches and vapours to arise, come, and be in and about divers dwelling-houses of the plaintiff, inhabited by his tenants, whereby the said dwelling-houses were rendered unhealthy and unfit for habitation, and the plaintiff lost his tenants.

The second count alleged that the defendants wrongfully caused large quantities of earth and rubbish to be placed and deposited on the street in front of, and on a lane adjoining, eight cottages of the plaintiff, inhabited by his tenants, and thereby raised and increased the level of the said street and lane three feet above their level at the time of the erection of the said cottages, whereby the water from the said street or lane was wrongfully caused to run in and flow upon the said cottages of the plaintiff, and the same were rendered unfit for habitation, and the plaintiff lost his tenants, and was obliged to raise the said cottages, and suffered great damage.

Plea: not guilty.

The cause was tried before Morrison, J., and a jury, at the last Fall Assizes for the county of York.

In the summer of 1874 the plaintiff was the owner of several cottages on a lane off Ontario street, between Duke and Duchess streets, in the city of Toronto. Each cottage was in the early part of the summer rented at \$8 per month. But during that summer Mr. Coatsworth, the city commissioner, caused from time to time to be dumped in the lane all kinds of filth and refuse, from which very bad smells proceeded, and sickness, in the opinion of medical men, ensued. This filth and refuse was from three to four feet deep in the lane. It consisted in part, according to the testimony of some of the witnesses, of dead dogs, dead cats, dead rats, and offal. The plaintiff again and again remonstrated with the city commissioner, and the drivers of the scavenger carts, but without effect. The filth ran over the lane into the basement of some of the houses, and into a well which was designed for the use of the houses. The plaintiff, who was a dealer in ice, was obliged to supply his tenants with ice in lieu of water until he dug for them another well on higher land. The new well cost him \$120. During rain the water from the putrid lane washed into his ice-house, and injured about sixty tons of ice, worth about \$4 a ton. The plaintiff from time to time reduced the rents of the cottages in the hope of inducing the tenants to remain, but not with much success.

The nuisance, notwithstanding the plaintiff saw the city commissioner as often as twenty times about it, was still continued and repeated in 1875, when the plaintiff was forced to sue, and, on 5th July, 1875, issued his writ.

It was also proved that plaintiff raised one of his houses No. 36, and removed the kitchen, to suit the level of the lane. The street was at the time raised up to the windows of the house, and pressed against the windows of the kitchen.

The man who did the work found the smell from the dirt rolling into the windows so bad that he had to get into the air at times. The filth was raised against the houses from three feet to three feet three inches high.

This closed the plaintiff's case.

Counsel for the defendants submitted that the changes in the level of the street constituted no cause of action, that defendants were not responsible for what Mr. Coatsworth the city commissioner did, and that the action of the plaintiff should be against the city commissioner.

The learned Judge overruled the objections.

The defendants did not call any witnesses.

The learned Judge left it to the jury to say whether, as to the first count, the plaintiff had suffered any damage, and as to the second count he told the jury that the defendants had a right to raise the street to a proper level, but in doing so must not unnecessarily do injury to lands lying contiguous. He also told the jury that if they were satisfied the defendants in doing what they did, negligently and improperly caused a greater quantity of water to flow on the plaintiff's land—water which would not have so flowed previous to the acts of the defendants—so as to injure the plaintiff's premises, the plaintiff was entitled to recover. He asked the jury to separate the damage, if any allowed, for raising the house No. 36, and removing the kitchen.

The jury found \$350 damages, \$50 of which was for raising No. 36, and removing the kitchen.

They found no damages under the first count of the declaration.

During Michaelmas term, November 24, 1875, *Biggar* obtained a rule calling upon the plaintiff to shew cause why the verdict as to the second count should not be set aside, and a nonsuit or verdict for defendants entered thereon, on the ground that there was no evidence that the trespasses complained of were the acts of the defendants; or why the verdict should not be reduced by \$50, being the assessed cost of removing an old kitchen and raising a building described as No. 36; or why there should not be a new trial for misdirection of the learned Judge, in telling the jury that if the improvements in the street so changed its level as to interfere with and increase the natural flow of water upon the plaintiff's land, the defendants would be liable without any allegation of negligence.

M. C. Cameron, Q. C., during this term, May 20, 1876, shewed cause. There was no such misdirection on the part of the learned Judge as alleged in the rule. The second count was proved. Mr. Coatsworth was shewn to be city commissioner. He had no right to place large quantities of rubbish and dirt on the street opposite to the plaintiff's premises, for in the quaint language of the report in *Tenant v. Goldwin*, 1 Salk. 360, 361, "he whose dirt it is must keep it, that it may not trespass:" *Hodgkinson v. Ennor*, 4 B. & S. 229; *Rowe v. The Corporation of the Township of Rochester*, 29 U. C. R. 590; and the defendants are liable for the acts of the city commissioner: *Green v. London General Omnibus Co., limited*, 7 C. B. N. S. 290.

Biggar, contra. It must be admitted that there was a mistake as to the ground of misdirection alleged in the rule, but Mr. Coatsworth was not sufficiently shewn to be city commissioner, and the corporation are not liable for what the city commissioner did: *Shearman & Redfield on Negligence*, 2nd ed., sec. 137; *White v. The City Council of Charleston*, 2 Hill S. C. 571; *McGary v. The City of Lafayette*, 12 Rob. La. 668; *Wallacott v. The Inhabitants*

of *Swampscott*, 1 Allen 101; *Thayer v. The City of Boston*, 19 Pick. 511; *Angell & Ames on Corporations*, 10th ed., sec. 311; *Dillon on Mun. Cor.*, 2nd ed., secs. 766, 768, 769, 772, 773, note; *Add. on Torts*, 4th ed., 935; *Wharton on Negligence*, secs. 191, 192, 195. Assuming the corporation to be liable for the acts of the city commissioner, nothing more was done than the city had a right to do, and as there is no charge of negligence in the declaration the plaintiff cannot recover: *Harrison's Mun. Man.*, 3rd ed., 430, note *a*; *Croft v. The Town Council of Peterborough*, 5 C. P. 35, 49; *Reid v. The Mayor, &c., of the City of Hamilton*, *Ib.* 269, 287; *Dillon on Mun. Cor.*, sec. 543, note 2, secs. 783, 787; *Shearman & Redfield on Negligence*, 3rd ed., sec. 370; *Dorman v. The City of Jacksonville*, 7 Am. 260, note. And in the absence, at all events, of a by-law authorizing what was done, there is no liability, 36 Vic. ch. 48, O., secs. 222, 425, 429, 440, 441, 424, sub-secs 1, 2, 3. See also *Jackson v. Pesked*, 1 M. & S. 243.

June 29, 1876, HARRISON, C. J.—The second count is not artificially framed, but there is no motion in arrest of judgment, or for a *venire de novo* on the ground of the insufficiency of the count: *Stephens v. Stephens*, 24 C. P. 424; and even if there were, every reasonable intendment would be made in its favour after verdict.

If the count shews a legal injury at all, in respect to which an owner of real property is entitled to sue, it sufficiently shews an injury to the plaintiff's reversionary interest, within the authority of *Jackson v. Pesked*, 1 M. & S. 234, relied on by the defendants' counsel. See also *City of Dixon v. Baker*, 16 Am. 591.

But the motion here is for a nonsuit, &c., and it is now well settled that where that which is laid as the cause of action in the declaration is proved at the trial, the plaintiff cannot be nonsuited upon the ground that the facts charged do not disclose a cause of action: *Lumby v. Allday*, 1 C. & J. 301; *Commercial Bank v. Harris*, 27 U. C. R. 526; *Darby v. The Corporation of the Township of Crowland*, 38 U. C. R. 338.

The only question therefore properly before us on this motion is, whether the count was proved at the trial, and if this be found for the plaintiff, the further question will arise as to the amount of damages.

The charge against defendants is, that they wrongfully placed the rubbish, &c., on the lane, thereby raising the level of the lane, and thereby wrongfully caused the water from the lane to flow upon the plaintiff's cottages, &c.

The count certainly would have been better if it had alleged that what was done was either done unlawfully, improperly, or negligently, for a rightful act may be so done as to be actionable. See *Rowe v. The Corporation of the Township of Rochester*, 29 U. C. R. 590.

A municipal corporation has full control over its streets, and can, within reasonable limits, lower or elevate the grade of them at pleasure; and so long as the work is properly done, owners of land abutting on a street have, under existing decisions, no claim to compensation: *Croft v. The Town Council of Peterborough*, 5 C. P. 35; *Reid v. The Mayor, &c., of the City of Hamilton*, 5 C. P. 269; *Regina v. Perth*, 14 U. C. R. 154.

It is true that these cases were decided under the statute 12 Vic. ch. 81, sec. 60, which in express terms enabled municipal corporations to pass by-laws for levelling, raising, and lowering streets, and that these words are not to be found in sub-sec. 1, of sec. 425 of the present Municipal Act, as pointed out in the note to p. 430 of the 3rd ed. of the Municipal Manual.

But I think the powers by the latter section conferred on municipal corporations to pass by-laws for "improving," "repairing," "widening," and "altering" streets involve the power when necessary for these purposes to level, raise, or lower the streets.

I on this point concur with the opinion expressed by Chief Justice Macaulay, in *Croft v. The Town Council of Peterborough*, 5 C. P. 35, 45, when he said: "I am at present disposed to think it within the general and incidental powers of the defendants to maintain and repair, and

to improve the public streets of the town placed under their charge; and in doing so to raise or lower them, as may be found necessary, judicious, or convenient for the public use, not exceeding what is reasonably requisite and proper, and doing no unnecessary injury to the property of others, but using due care and precaution to avoid injury to the same."

No municipal corporation under the plea of public convenience ought to be permitted to exercise their powers on their own land to the injury of the land of another in a mode that would render an individual liable to damages. See *Rowe v. The Corporation of the Township of Rochester*, 29 U. C. R. 590, 595 : *Nevins v. The City of Peoria*, 41 Ill. 502; *City of Aurora v. Gillett*, 56 Ill. 132.

The rule laid down in *Croft v. The Town Council of Peterborough*, 5 C. P. 35, and following cases, is the same as laid down in Massachusetts in *Callender v. Marsh*, 1 Pick. 417, and the latter decision is said to have been approved of in every State of the Union, except Ohio. See per Randall, C. J., in *Dorman v. The City of Jacksonville*, 7 Am. 253; see further note *a* to sec. 425 of the Municipal Manual.

In a recent case in England, where the owner of land was complaining of an injury to his property by reason of a change of level in the street, Kelly, C. B., said: "I cannot but observe in a case like this, that, whenever it appears that the case is one in which it is plain that very serious injury may have been done to the premises of the party claiming compensation, I think that we must put a liberal construction upon the Acts of Parliament before us, in determining the points raised. Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operations of a public body, shall be entitled in a Court of law to compensation." *Regina v. Vestry of St. Lukes, Chelsea*, L. R. 7 Q. B. 148, 153. See further, *Bigg v. The Corporation of London*, L. R. 15 Eq. 376.

In this spirit our Courts have held that municipal corporations conveying to, and throwing more water on the land of a property owner than before their work it received, are liable in damages, although the work was done in the repair of a road, and done without negligence: *Perdue v. Corporation of the Township of Chinguacousy*, 25 U. C. R. 61; *Stonehouse v. Corporation of the Township of Enniskillen*, 32 U. C. R. 562; *Rowe v. Corporation of Rochester*, 22 C. P. 319.

Where a city corporation is proved, as here, to have used in the summer time dead dogs, cats, rats, and other filth and offal to raise the grade of a street, and thereby affected the health of people living on the street, and from such a putrid mass to have thrown mud and water against the houses situate on the street, it would be monstrous for any Court calling itself a Court of justice to hold that they are not liable in damages to the persons aggrieved. See *City of Dixon v. Baker*, 16 Am. 591.

It may be that the picture of the plaintiff's wrongs, as presented by himself and his witnesses, is unduly coloured; but as the defendants did not offer the city commissioner or any other witness for the purpose of removing the undue glare, the defendants cannot be heard to complain of the amount of damages, if a jury did not take the most favourable view of their conduct.

The city commissioner, if sued on the facts as presented to the jury in this case, would be unquestionably liable, and liable to be well punished in damages for conduct which, according to the plaintiff's evidence, if in all respects true, is so bad and so heartless, as to be almost incredible.

But the defendants who, notwithstanding the serious accusation made against their own officer—an accusation which imperatively demanded some explanation—refrained from putting him in the box, and now contend that they are not liable for his conduct.

The case was tried in the city of Toronto, where that officer and his duties are well known. Probably for this reason no evidence was given as to his office or general

duties. Strictly speaking such evidence ought to have been given. He was, however, described by several of the witnesses as Mr. Coatsworth "*the city commissioner.*" What he did, according to the evidence, was, to raise the level of one of the highways of the city during the summer season by means of a putrid mass of rubbish injurious alike to health and property.

The Municipal Act, sec. 372 sub-sec. 2, enables the councils of cities to appoint overseers of highways, road surveyors, road commissioners, &c. The duties of these officers are not detailed in the Act, but their names of office sufficiently designate their duties. It must be assumed on the evidence of the plaintiff, and without any evidence whatever from the defence, that "*the city commissioner*" was the servant of the city, and as such had power to raise the level of the streets of the city.

It is not too much to assume, in the absence of evidence to the contrary, that he had the power which, as the servant of the city, he assumed to exercise on one of the streets of the city. In all probability the cause that he was not called as a witness is, that his power on his own evidence would have been placed beyond controversy, for it plainly appeared that he was the servant of the city, having some control over its streets.

A municipal corporation is responsible for the acts of its servants upon the same principle and to the same extent as a private individual.

A master is bound by work done by his servant, although in excess of his instructions, if done in relation to his service, and in the supposed interest of his master. See *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Tebbutt v. The Bristol and Exeter R. W. Co.*, L. R. 6 Q. B. 73; *Bayley v. The Manchester, Sheffield, and Lincolnshire R. W. Co.*, L. R. 7 C. P. 415; S. C., L. R. 8 C. P. 148; *Tench v. Great Western R. W. Co.*, 33 U. C. R. 8; *Scott et ux. v. Grand Trunk R. W. Co.*, 24 C. P. 347. See further *Higgins v. Waterliet Turnpike and R. W. Co.*, 7 Am. 293; *Jackson v. The Second Avenue R. W. Co.*, Ib. 448; *Garrettzen v. Duenckel*, 11 Am. 405.

The corporation, by one of its officers having, in relation to his service and in the supposed interest of the defendants, done the wrongful acts, in respect of which the plaintiff complains, cannot be allowed to escape the consequences on the ground contended for by the defence, that there was no by-law passed authorizing what he did.

In *Croft v. The Town Council of Peterborough*, 5 C. P. 35, 46, Macaulay, C. J., said: "Whatever is cast upon the defendants as executive duties under the statutes in relation to the maintenance or repair of the roads, or whatever is fairly included in those terms, they may do without a by-law; when not so, and it is only within the exercise of their legislative powers, it would be otherwise."

In *Reid v. The Mayor, &c., of the City of Hamilton*, 5 C. P. 269, 287, the same learned Judge said: "My present impression is, that wherever the acts to be done by the municipality will invade private rights, which may be so invaded legally through the medium of by-laws, and for which, if not legalized by the statutes creating, or the powers conferred upon, the corporation, the party injured may maintain an action against the wrongdoer, a by-law is essential to enable the municipality to justify the act, unless it can be shewn to be repair of a highway, &c."

It is not in the power of the municipal corporation to pass any by-law which would legalize the acts in respect of which the plaintiff complains, in the mode in which they were done; but if there be such a power, and the same can only be exercised by by-law, it is for the defendants, and not for the plaintiff, to produce and prove the by-law.

The only remaining question is, as to the damages. The learned Judge who tried the cause is of opinion that the damages claimed for removing of kitchen, &c., and allowed at \$50, could not be recovered. In that opinion I concur.

The rule will therefore be absolute to reduce the verdict to \$300, and discharged as to the residue. No costs of the rule to either party.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule accordingly.

IN RE STORMS AND THE CORPORATION OF THE TOWNSHIP OF ERNESTOWN.

Public schools—Distribution of school funds—37 Vic. ch. 28, sec. 48, subsec. 4; sec. 153, O.

A township by-law enacted that the interest arising on the invested funds for schools in a township should be apportioned on and according to the number of days the schools had been open or taught in each half year. It was objected that the by-law was one made under the 37 Vic. ch. 28, sec. 48 subsec. 4, O., which did not authorize this method of apportionment. The Court refused to quash the by-law, as the effect of so doing, under the facts stated in the case, would be to place the apportionment as provided by earlier by-laws and resolution, and in effect produce no change, and moreover the municipality, under sec. 153, could by another mode do what the by-law purported to do.

Quære, whether the money in question, having been specially appropriated by by-laws under the 20 Vic. ch. 71, was within the section 48 sub-sec. 4 above referred to.

The question raised being doubtful, the rule was discharged without costs.

In Easter term, May 22, 1875, *Harrison*, Q. C., obtained a rule *nisi* herein, calling on the Corporation to shew cause why the second clause of by-law No. 1 of the year 1875, should not be quashed with costs for illegality, and on grounds disclosed in affidavits and papers filed.

The by-law in question recited that by-law No. 8 of 1874, apportioning the interest money arising on the invested funds for public schools in Ernestown, was not approved of by a majority of the ratepayers, and by the first section, enacted that the said by-law No. 8 of the year 1874 should be, and that the same was thereby repealed.

The second section, the one now in question, was as follows:—"And be it enacted further, that the interest fund arising on the said invested money for schools in Ernestown, be apportioned to the public schools in Ernestown corporation on and according to the number of days the said schools have been open or taught in each and every half of any and every year. Said apportionments are hereby required to be made in and during the months of July and January, for the last preceding half year." The by-law contained no other provision.

By-law No. 8 referred to and repealed, was as follows :—
“Be it enacted, &c., that the interest received on the funds invested for public schools in Ernestown, shall be in any and every half year of every year apportioned according to the number of days taught by each and every authorized teacher who has taught in Ernestown corporation, and a just proportion to union sections; provided always that not more than two teachers be allowed a dividend in any one school section in the Corporation.”

A great number of affidavits were filed on both sides.

During Hilary term, February 24, 1876, *Bethune* shewed cause.

And *Robinson*, Q. C., supported the rule.

The arguments sufficiently appear in the judgment.

June 29, 1876. MORRISON, J.—After carefully reading over the many affidavits filed on both sides, apart from any legal question, it appears to me that on the merits the defendants would be entitled to succeed, as I think it appears very clearly that the action of the municipality is in accord with the majority of the ratepayers, and that they have adopted a system of distribution recognised by the Legislature.

The question, however, is, whether we are compelled to quash the second section of the by-law. The rule *nisi* does not shew or set forth any grounds of illegality, and during the argument the ground taken was, that it was a by-law intended or supposed to be made under the authority of sec. 48, sub-sec. 4, of the school act of 1874, 37 Vic. ch. 28, O., which section, it was contended, only authorized the distribution of the money in question among all the public schools ratably and proportionate to each according to the amount of the salaries paid in each school section.

Sub-sec. 4 is as follows :—“To apportion at its (the Council's) discretion either out of moneys raised by rate, or out of any other moneys at its disposal and not otherwise specifically appropriated, a sum to all of the public schools in the township equal to such proportion as the Council may

see fit of the actual salaries paid in the respective school sections during the year then last past to the public school teachers of such sections."

Now the moneys in question were derived from the Upper Canada Municipalities fund, proceeds of the Clergy reserves, and it appears from the affidavits filed that such moneys were appropriated in 1856 by a resolution of the Council, and specifically ordered to be invested, and the interest thereof to be applied to the school fund half yearly on the scale of the average time the schools were kept open; and after the passing of the Act of the 20 Vic. ch. 71, sec 2, (Consol. Stat. C. ch. 25, sec. 11), assented to 10th June, 1857, which section provided, that the Municipality might by by-law set apart for any special purpose, which special purpose shall be mentioned in such by-law, the whole or any part of the funds derived from the "Upper Canada Municipalities fund," and to invest the same, &c., for the purposes mentioned in such by-law, and from time to time to sell, &c., such securities and re-invest the proceeds in otherlike securities, or otherwise appropriate the same in the manner mentioned in and directed by the same by-law or other by-law passed for that purpose."

This municipality on the 5th Oct., 1857, passed a by-law reciting the 20 Vic. ch. 71, providing that these moneys then amounting to \$7,200, and all other of such moneys received in future years, should be continued invested for the same purposes mentioned in the resolution of 1856, and that the interest arising from the fund should also be apportioned as therein mentioned, and that from 1857 to 1860, the interest of such moneys was so apportioned.

In the latter year a new by-law was passed re-investing the moneys to the like effect as that of 1857, which also contained the provision that it should not be altered or repealed but by a by-law passed by the Council before the 1st of November of any year, and approved of by the vote of the majority of the municipal electors of the

township; and under that by-law, the interest of the fund was appropriated according to the original resolution on the scale of the average time the schools were open.

In June, 1874, a by-law was passed (No. 8), a copy of which was filed by the applicant, which by-law did not alter the apportionment, but it provided in addition "for a just proportion to union sections, and that not more than two teachers be allowed a dividend in any one school section in the Corporation."

This by-law in that respect was considered illegal by the council elected in January, 1875, and they on the 19th January passed the by-law the second section of which is now asked to be quashed, the first section repealing by-law No. 8: in other words, if we made the rule absolute, it would place the apportionment and distribution of the moneys as provided in the by-law of 1857 and 1860, and under the resolution of 1856, and produce the same effect that that the by-law now in question does, so that upon that ground alone we ought not to interfere.

But irrespective of that view of the case, I am not prepared to say that these moneys so specifically appropriated by by-laws under the authority of the 20 Vic. ch. 71, in 1856 and in 1860, are within section 48, sub-sec. 4 of the Act of 1874, 37 Vic., ch. 28, O. That sub-section contemplates moneys otherwise specifically appropriated and exempts such moneys from its operation.

On the part of the Council it was contended that the mode of distribution provided for by the by-law was the best for all purposes, and was a by-law practically in effect as one passed under section 153 of the act—which provides that any Municipal Corporation having surplus moneys set apart for educational purposes, may by by-law grant any portion of such moneys or other general funds by way of gift to aid poor school sections within the municipality—as by the distribution of the moneys it tended to aid and to influence the poorer schools to keep them open.

I think myself that it is the most equitable mode for the distribution of such a fund as according to the work done, and

it is one of the modes which the Legislature has authorized for the distribution of the yearly government grant, for the sub-sec. 3 of section 129 of the same Act of 1874, provides if the Chief Superintendent deems it expedient to, direct the distribution of the public school fund among the several school sections according to the length of time in the year during which a school has been kept open.

It appears there are 21 school sections in the township, and the aggregate amount derived from the fund and distributed in 1874 was about \$950, and it is complained that seven sections did not get their ratable share, the whole amount alleged to be wrongly appropriated being about \$200, and one section, No. 13, containing the village of Odessa, claiming of that amount about \$100, as that section pays in salaries about one sixth of the aggregate amount paid by the 21 sections, and it is for the benefit of that section that this application is principally made, and it is evident that these seven sections are the wealthiest and most populous, and the municipality under the authority of section 153, could have done what the by-law is alleged to do, distributing the fund as it has done by aiding the poorer schools by adopting another mode.

On the whole, we do not think we ought to interfere by making the rule absolute, but as the case may be said to be one not free from doubt, there will be no costs.

HARRISON, C. J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

OWEN V. TAYLOR.

Distress.

An action for distraining for more rent than is due, cannot be maintained without a tender of the sum which is really due; and the excess paid cannot be recovered back as money had and received.

Semble that an infant may make a warrant of distress.

THIS was an action for illegal distress, tried at the last Fall Assizes at Toronto, before Harrison, C.J., without a jury.

The declaration contained counts for distraining for rent falsely alleged to be due; for distraining for pretended arrears of rent; for threatening to sell for such pretended arrears, and for excessive distress.

The material facts appeared, by the finding of the learned Chief Justice to be, that the premises out of which the rent issued were, at the time of the demise and afterwards, the joint property of the defendant and of Samuel Owen: that Samuel Owen demised them to the plaintiff on the 1st June, 1875, at a rental of \$10 a month, and that the first payment of rent was due on 1st July, 1875: that Samuel Owen died on the 24th June, 1875, having made a will sufficient to pass real estate: that by his will he devised his interest in the premises to his widow and the plaintiff, one of his executors; that the plaintiff proved the will; that the widow, on the 1st July, 1875, died intestate: that the defendant is one of the heirs of the widow: that he was not of age till 21st December, 1875; that on the 29th July, 1875, he caused a distress to be made on the plaintiff for \$14 rent, and afterwards received the amount; and that the defendant had no right, under any circumstances, to distrain for more than \$10.

The learned Chief Justice, under these circumstances, entered a verdict for plaintiff for \$4, reserving leave to defendant to move to enter a nonsuit on the objections taken by him to the plaintiff recovering.

These objections were that, as defendant was a minor, he could not appoint an agent, although he got the rent; and that there was nothing to shew any damage, except the difference between \$10 and \$14.

In Michaelmas Term, November 27, 1876, *M. C. Cameron*, Q.C., obtained a rule *nisi* to enter a nonsuit, on the ground that the verdict was against law and evidence, and because the defendant was an infant and could not authorize a distress through a warrant of distress; and because the action could not be maintained, the amount of rent admitted to be due not having been tendered.

During this term, June 2, 1876, *Hagel* shewed cause.

The defendant if not liable for signing the warrant because a minor, made himself so by taking the money, the proceeds of the distress: *Stavelly v. Allcock*, 16 Q. B. 636; *Tancred v. Leyland*, Ib., 669. The reversion had been severed, so there could be no distress: *Stavelly v. Allcock*, 16 Q. B. 636.

M. C. Cameron, Q. C., contra. An infant cannot authorize or be made liable for a distress put in motion by his supposed authorization. The distress was excessive. He relied on *Woodfall*, L. & T., 10th ed., 584.

June 29, 1876. MORRISON, J.—In this case I am of opinion that our judgment should be in favour of the defendant, and that the rule should be absolute to enter a nonsuit.

The case of *Glynn v. Thomas*, 11 Ex. 870, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, which was not cited on the argument, is a clear authority in favour of the defendant. There the facts set out in the declaration were similar to those alleged in this case, and upon which the plaintiff relied.

Coleridge, J., who delivered the judgment of the Court said, p. 875: "For the plaintiff in error the case mainly relied on was *Tancred v. Leyland*, in Error, 16 Q. B. 669; and that case decided that the merely taking goods in distress on a claim of more rent being in arrear than was in fact in arrear, and selling them on such claim, was not actionable; first, because the distrainer for rent is not bound by the amount for which he claims to distrain, and though he takes, alleging that he does so for an amount exceeding the real arrears, he may sell afterwards only for that which is really due."

In the same judgment he says, p. 875: "The count before us shews a *taking* of goods, not alleged to be more than sufficient to cover the real arrears with the charges, but on an untrue claim of larger arrears than were due: it does not go on to allege a sale of more than would cover the real arrears with costs, but it alleges what it asserts to be a compulsory payment of those larger supposed arrears, in order to regain possession of the goods distrained, of which the defendant remained in possession until such payment. The question therefore is, whether this allegation is equivalent in effect to an allegation of a sale of the goods by the defendant for more than the rent really due. If the payment of the money is to be considered voluntary, as it was clearly made with a full knowledge of the facts, it cannot be contended that a right of action can be grounded on it."

And after referring to *Sells v. Hoare*, 1 Bing, 401, and stating that that case did not interfere with the general and well-known rule, the judgment proceeds, p. 876: "It is alleged * * that the plaintiff was compelled to make it (the payment,) and did make it, in order to regain possession of his goods; and this allegation, being taken to be true, we must assume now such a state of facts as would have proved it, if put in issue. But the facts necessary for that purpose would be merely that the plaintiff demanded the goods, and that the defendant refused to deliver them unless the alleged arrears with the charges of the distress were paid, and that the payment was made in consequence. Still this would not make the demand extortionate, or the payment such as could be recovered back in this form of action, unless from these facts it followed that the detention of the goods became unlawful. Now as some rent was due, the taking was lawful; and as the taking was lawful, so was the detention until the sum really due, with enough to cover the lawful charges, was tendered. Under these circumstances, the defendant, whose proceedings were unquestionably lawful up to this point, was entitled to a tender of that amount which the plaintiff alleged was the

sum really due; upon his refusal to accept that sum, the plaintiff's course was to procure the immediate possession of the goods by replevin, and to put the disputed question of amount in that course of settlement which the law prescribes for it."

During the argument, I thought it possible that the plaintiff might maintain an action to recover the \$4 paid in excess of rent due, and that this action might be treated as an informal action of money had and received; but the case of *Gulliver v. Cosens*, 1 C. B. 788, and the judgment of the Court in the case of *Glynn v. Thomas*, 11 Ex. 870 clearly shew that the excess so paid cannot be recovered back.

It is not, under these circumstances, necessary to decide the point whether a minor can make a warrant of distress. I have not been able to find any decided authority. It is laid down in *Bacon*, Ab. vol. iv. 369, title, "Infancy and Age," (I.), 4. "Therefore it hath been adjudged, that if an infant let a house to J. S., reserving rent, and the rent be in arrear, the infant may distrain for the rent or bring an action of debt; though it was objected, that, in the institution, the contract was not reciprocal."

And in *Story* on Agency, 7th ed., sec. 6, the learned author states the general rule that infants are incapable of delegating authority, except under special circumstances, "Thus, for example, an infant may authorize another person to do any act which is for his benefit; but he cannot authorize him to do an act which is to his prejudice. If, therefore, an infant should make a letter of attorney to another, to take livery of lands on a feoffment to him, it will be good; for it will be intended to be for his benefit. But if an infant should make a feoffment, and execute a letter of attorney to another, to make livery in his name to the feoffee, it will be void; * * for such feoffment and livery will be intended to be to his prejudice."

Now, the act of authorizing a person to make a distress is one incident to that of a landlord, and is an act for his benefit; and it seems to me, upon the reasoning of the

authorities, that if an infant can make a lease and has the right of distress, he may exercise the right in the ordinary way, either in his own person or by authorizing to distrain for his benefit.

On the whole, the rule will be absolute.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

IN THE MATTER OF THE NIAGARA HIGH SCHOOL BOARD
AND THE CORPORATION OF THE TOWNSHIP OF NIAGARA.

High schools—37 Vic. ch. 27, O.

Held, on rehearing, affirming the judgment of Wilson, J., 37 U. C. R. 529, that under 37 Vic. ch. 27, O., the High School Board for a district consisting of two municipalities, a town and a township, could call upon one of the municipalities, the township, to contribute towards the erection of a school-house in the other municipality, and not merely towards its maintenance.

REHEARING, from a decision of Wilson, J., sitting alone.

In Michaelmas term, *James A. Miller* obtained a rule *nisi* for a mandamus to compel the township of Niagara and the reeve, &c., of the township forthwith to raise \$2,008.47, the amount or proportion required to be raised and paid by the said township for the purpose of providing for school accommodation for the Niagara High School, as required by the demand of the said board, in pursuance of the powers given them by the Consolidated High School Act of 1874.

On the 7th January, 1876, Wilson, J., gave judgment, making the rule absolute.

The application will be found reported in 37 U. C. R. 529.

During this term, May 30, 1876, the motion came on by way of rehearing.

M. C. Cameron, Q. C., for the parties moved against.

James A. Miller, contra.

The argument was similar to that before Wilson, J.

June 29, 1876. HARRISON, C. J.—This is a re-hearing from the decision of Wilson, J., in vacation, reported 37 U. C. R. 529, making absolute a rule for a writ of mandamus.

The only question argued before us was, as to the obligation of the township of Niagara to contribute towards the erection of a high school in the high school district, consisting of the town and township of Niagara.

Other questions might have been presented — see *Re Board of Education of Perth and the Corporation of the Town of Perth*, 39 U. C. R. 34,—but as the proceeding is in the nature of an appeal, we shall dispose of it on the ground of appeal taken, and on no other ground.

The decision of the question raised must depend upon the construction to be placed on sections 45 and 46 of the Act consolidating and amending the law as to collegiate institutes and high schools: 37 Vic. ch. 27, O.

In order rightly to understand the meaning of the two sections, it is necessary to go back a little in the Act and examine some of the preceding sections.

The Act is intituled “An Act to amend and consolidate the Law relating to the Council of Public Instruction, the Normal Schools, Collegiate Institutes, and High Schools.”

It has the appearance of being arranged with more than ordinary care and skill.

It is preceded by the following table of contents:—

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| Part | I. Constitution and duties of the Council of Public Instruction. |
| “ | II. Appointment and duties of the chief superintendent. |
| “ | III. High schools and their districts. |
| “ | IV. Municipal councils and their duties. |
| “ | V. High school trustees and their duties. |
| “ | VI. High school grants and other moneys. |
| “ | VII. High school masters and teachers. |
| “ | VIII. High school sites and other property. |
| “ | IX. Miscellaneous provisions. |
| “ | X. Repealing and confirming clauses. |

Some of these heads are afterwards subdivided in the body of the Act.

In construing the Act we may properly refer to these headings and sub-headings in matters of doubt: See *Laurie v. Rathbun*, 38 U. C. R. 255.

In the present case we are only concerned with headings 3 and 4, and the sections thereunder placed.

They are as follow:—

Part III. High schools and their districts.

1. Existing divisions—Agreements.
2. Name of high school—Place of holding the school—
Its discontinuance.
3. High school districts to be defined.
4. Establishment of new high schools.
5. Powers of boards in high school districts.
6. Cities and towns separated to be counties.
7. High school districts in towns separated.

1. *Existing divisions—Agreements.*

All high school and collegiate institute divisions and districts, &c., existing since the Act took effect are to continue subject to the provisions of the Act: Sec. 34.

2. *Name of high school—Place of holding the school—
Its discontinuance.*

There is to be a high school or high schools or collegiate institute in every county and union of counties, to be distinguished by prefixing to the words high school or collegiate institute the name of the city, town, or village within the limits of which any high school or institute may be situate: Sec. 35.

The place of holding any high school in a county or union of counties may be changed at the end of the then civil year by the council of the county within which it is established, by a by-law or resolution passed for that purpose, &c: Sec. 36.

Every county council, at or before its June session in any year, has authority (with the consent of the Lieutenant-Governor, on the report and recommendation of the Chief Superintendent of Education) to decide upon the discon-

tinuance at the end of the then civil year of any existing high school in any part of the county within the jurisdiction of the county council: Sec. 37.

3. *High school districts to be defined.*

The county council is from time to time to determine the limits of a high school district for each high school or collegiate institute existing within the county and within its municipal jurisdiction: Sec. 38.

The county council may (under the restrictions presented in the next succeeding section) form a village or town and the whole or part of one or more adjoining townships within its jurisdiction into a new or additional high school district in the county. Sec. 39.

4. *Establishment of new high schools.*

No additional high school is to be established by a county council in any county except at or before its June session in any year, nor unless the high school fund shall be sufficient to allow of an apportionment at the rate of not less than four hundred dollars per annum to be made to such additional school, without diminishing the fund which was available for high schools during the next preceding year: Sec. 40.

5. *Powers of boards in high school districts.*

The high school or collegiate board of any district formed by the county council possess all the powers within the district "for the support and management" of the high school or institute, and in respect to the county council, as are possessed under the Act by high school boards generally in respect to "the support and management" of the high schools under their care: Sec. 41.

6. *High school districts in cities and towns separated.*

Every city and every town separated for municipal purposes from the county in which it is situated, and the high school district of every town separated, is for all high school purposes a county, and its municipal council is invested with all the high school powers possessed by county, city, or town council: Sec. 42.

In the case of high schools situated in towns separated from the jurisdiction of a county council, the council of the

county and the council of the town, by such joint action as may be agreed upon, may unite the whole or any part of an adjoining township, or adjoining townships, with such town, so as to form a high school district upon such terms and conditions, and for such period, as may be mutually concurred in: Sec. 43.

Next comes the heading,

Part IV. Municipal councils and their duties.

The following are the sub-divisions of this head:—

1. Obligatory municipal assessment for high schools.

(1) County and city.

(2) County town, town separated, village and township.

(3) High school districts.

2. Voluntary municipal assessments.

3. Moneys to be paid to treasurer.

4. Treasurer's accounts to be audited.

1. *Obligatory municipal assessments for high schools:*

(1) A sum equal to one half of the amount paid by the government to any high school or collegiate institute, in a city or town *withdrawn from the jurisdiction of the county*, together with such other sums as may be required for the *accommodation and support* of such school, shall be provided by the municipal council of such city or town, upon the application of the high school board: Sec. 44.

(2) In the case of a high school in a town *not withdrawn* from the county, or in an incorporated village, or township, one half of the amount paid by the government shall be paid by the municipal council of the county in which such high school or collegiate institute is situated, upon the application of the high school board, and such other sum as may be required for *maintenance and accommodation* shall be raised by the council of the municipality in which the high school is situated, upon the application of the high school board: Sec. 45.

(3) In the event of the county council forming the whole or part of a county into one or more high school districts, then such *other* sums as may be required for the *main-*

tenance of such high school *shall* be provided by the high school district upon the application of the high school board:
Ib.

The foregoing sums, so far as the municipalities are concerned, are to be raised as in the manner provided in the next section.

It provides that the council of any municipality, or the councils of the respective municipalities out of which the whole or part of such high school district is formed, *shall*, upon the application of the high school board, raise the *proportion* required to be paid by such municipality, or part of the municipality, from the whole or part of the municipality (as the case may be): Sec. 46,

The object of these three sections (from sec. 44 to sec. 46, both inclusive) is to provide for the accommodation and support of the high schools. The words "accommodation and support" are of wide significance. They, I think, embrace the procuring of sites, building, repairing, furnishing, warming, and keeping the high school houses and their appurtenances in order; for all these things are necessary for the accommodation and support of the high schools.

These things cannot be done without money, and so provision is made in the three sections for the procurement of the money necessary.

The government grant is available, but not enough, and so provision is made for supplementing it.

If the high school be situate in a city or town withdrawn from the jurisdiction of the county, a sum equal to one half of the amount paid by the government, together with such *other* sums as may be required for the accommodation and support of the school, is to be provided by the council of the corporation of the city or town.

If the high school be situate in a town *not* withdrawn from the county, or in an incorporated village or township, one half of the amount paid by the government shall be paid by the municipal council of the county in which the high school is situated, and such *other* sum as may be required shall be raised by the council of the municipality in

which the high school is situated, upon the application of the high school board: Sec. 45.

This section uses the words, "maintenance and school accommodation," instead of the words "accommodation and support," used in the preceding section; but as there is no difference in signification between the words "support" and "maintenance," and as the word accommodation is used in each section, there can be no doubt that both phrases mean one and the same thing.

It is to be regretted that the Legislature has not in each section used precisely the same words to denote precisely the same thing.

We do not, however, look upon the difference in language as indicating anything more than the carelessness of the framers of the Act.

But we regret to say that the carelessness of the framers of the Act is still more obvious the further we proceed in the reading of the Act.

In the event of the county council forming the whole or part of a county into one or more high school districts, then such *other* sums as may be required for the *maintenance* (dropping the word accommodation) shall be provided by the high school district upon the application of the high school board: Sec. 45.

The Legislature throughout these sections is evidently providing the ways and means for the accommodation and support of the high schools.

The basis of the expenditure in every case is, the government grant.

The next source of supply is, an amount equal to half of the government grant, to be provided by the council of a city, or town separated from the county, or by the council of the county where the school is situated in a town not withdrawn from the county, or an incorporated village.

The *balance* necessary in each of the foregoing cases is to be provided by the council of the city, or town withdrawn from the jurisdiction of the county, county council, or high school district respectively, as the case may be.

This was unquestionably the object of the Legislature, and so long as that object can be attained consistently with the language used, we are bound to effectuate the intention.

It is plain that the Legislature did not intend that any high school should be without proper accommodation and support.

To read the word "maintenance," used in the latter part of section 45, as meaning *only* support, might be to leave a high school in a high school district, formed by the county council, in whole or in part of a county entitled to support, but without accommodation, which would be absurd.

If the framers of the Act, besides omitting the word "accommodation," had made any other provision as to accommodation, we might have said that the omission was designed, but in the absence of such a provision we must read the word "maintenance" as having the same signification as the words "accommodation and support," used in section 44, and as the words "maintenance and school accommodation" used in the first part of section 45.

The general rule is, that nothing is to be added to or to be taken from a statute unless it furnishes adequate grounds to justify the inference that the Legislature intended something which it has failed precisely to express: Per Tindal, C. J., in *Everett v. Wells*, 2 M. & G. 269, 277.

It is a canon of interpretation of statutes that all words, if they be general, are to be restricted to the fitness of the subject matter, and are to be construed as particular if the intention be particular—that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and to it only: *Maxwell* on the Interpretation of Statutes, 55.

And it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself: *Ib.* 25.

We must read the word "maintenance," as used in the latter part of section 46, in the same sense as it was read by Mr. Justice Wilson, and for that reason agree with him in

thinking that the rule should, as against the only objection raised by the municipality, be made absolute for a mandamus.

"The proportion" meant by section 46 of the Act is the proportion of the "*other* money," in other words, the balance of money required by the high school board for "the accommodation and support" of the high school, after deducting the government grant and the grant from the county council.

The only reported case as to the meaning of the word "maintenance" and "maintenance and school accommodation" used in this Act—*Re Trustees of the Port Rowan High School and The Corporation of Walsingham*, 23 C. P. 11—has not much, if any, bearing on the points which we have been called upon to decide on this application.

The motion for the rehearing must be dismissed, with costs.

MORRISON, J, and WILSON, J., concurred.

Appeal dismissed (a).

(a) This decision has been since affirmed by the Court of Appeal

PATERSON V. MAUGHAN ET AL.

Chattel mortgage, right of partner to give—Future liability—Application of Chattel Mortgage Act—Possession taken by mortgagee—Seizure by sheriff—Damages.

One partner of a firm authorized the other to obtain an endorser, in order to raise money from a bank: *Held*, that if express authority was required, this empowered the partner to mortgage all the stock-in-trade of the firm to secure such endorser.

A chattel mortgage need not be under seal; and when it contains no re-demise, the mortgagee may take immediate possession.

A mortgage, given to secure the mortgagee against liability on notes *to be endorsed* by him, is valid at common law, and not being provided for by the Chattel Mortgage Act, C. S. U. C. ch. 45, is excluded from its operation, and not avoided by it.

The mortgagee having taken possession of the goods, they were seized by the sheriff, under an attachment against one of the partners as an absconding debtor, and afterwards delivered by the sheriff to the assignee in insolvency of such partner. *Quære*, whether the sheriff was entitled to question the mortgage on behalf of creditors, without proof of the debt on which the attachment was founded. In this case, no such debt existed, for the note given for the debt was not due when the attachment issued. *Semble*, also, that the sheriff had no right to object that the notes secured by the mortgage were not properly stamped.

Held, also, that the sheriff had no right, either as representing the attaching creditor, or the assignee in insolvency of one of the partners, to take the goods out of the possession of the mortgagee: that he was liable for the full amount of the plaintiff's interest in them; and that his having handed them over to the assignee could form no ground for reducing the damages.

But a verdict having been rendered for that sum, it was made a condition, on refusing a new trial, that the plaintiff should assign to the sheriff his interest in the mortgage, so that the sheriff might, if possible, recoup himself.

THIS was an action against a sheriff for the recovery of damages.

The first count was trespass, for seizing and taking the goods and chattels of the plaintiff, that is to say, all the goods, chattels, and stock in trade in the shop known as the store of Caton & Cole, on Poulet street, in the town of Owen Sound.

The second count was trover, for the conversion of the same goods.

Pleas: 1. Not guilty. 2. Goods not the plaintiff's.
Issue.

The cause was tried at the last Fall Assizes for the County of Grey, before Harrison, C. J., and a jury.

The firm of Caton & Cole was formed in the fall of 1874, James Caton and William Cole were the partners. They had a general store on Poulet street in Owen Sound. On the 17th May, 1875, Caton applied to the plaintiff to endorse notes of the firm for the purpose of retiring some maturing obligations of the firm. The plaintiff agreed to do so to the extent of \$2,000, provided he received satisfactory security. Cole at the time was in Toronto, sick and unable to attend to business, and Caton was left to manage the business as best he could. Caton thereupon executed a chattel mortgage on the stock in trade of the firm.

The chattel mortgage was dated 18th May, 1875. It was expressed to be made between James Caton and William Cole of the town of Owen Sound, merchants, trading under the name of "Caton & Cole," of the first part, and the plaintiff, of the second part.

It recited that the party of the second part had agreed with the parties of the first part to endorse for them their notes and any necessary renewals thereof, so as to enable the parties of the first part, by discounting the same, to realize an amount in the aggregate not to exceed \$2,000, upon being secured against the liability so to be incurred by him, the party of the second part, as such endorser, and so as such liability should not extend beyond the period of one year from the date.

The property mortgaged was described as "all the goods, chattels, and stock in trade of Caton & Cole, in said mortgage named, in their store on Poulet street in the town of Owen Sound; and all the goods, chattels, and stock which may be taken in stock in said store during the continuance of the mortgage or any renewal thereof."

The condition was, that the parties of the first part should well and truly save harmless the party of the second part "from his endorsement of the said promissory notes," and there was a covenant to that effect on the part of the mortgagors.

The mortgage was signed "Caton & Cole," in the hands writing of Caton, without seals of any kind.

The mortgage was filed in the office of the clerk of the County Court on the same day that it was given.

The plaintiff, within a few days after the mortgage was given, but on different days, endorsed for Caton & Cole the following promissory notes:—

Note dated 4th May, 1875, for \$700 at three months.

Note dated 17th May, 1875, for \$800 at three months.

Note dated 19th May, 1875, for \$300 at three months.

The stamps were cancelled as of the dates of the notes.

The first two notes were antedated to cover notes for similar amounts for \$700 and \$800, falling due at the bank on the 4th and 17th of May respectively.

Caton wrote to Cole before the notes were due that they were maturing, and that there was no money to retire them. Cole wrote, in answer, to get some friend to endorse, and to get the money out of the bank for the purpose.

This was before Caton applied to the plaintiff for his endorsement.

There was a dissolution of the firm on the 2nd of June following.

Paterson having endorsed the notes, was obliged to retire each of them as each note fell due at the bank.

Cole shortly after the endorsement of the notes absconded, having, it was said, in some manner conveyed his interest in the stock in trade to Caton.

On the 23rd of July, 1875, Arnold McClean and Samuel McClean caused a writ of attachment to be issued against the goods of William Cole, as an absconding debtor, and placed the writ in the hands of the defendant Maughan, sheriff of the county of Grey, for execution.

The plaintiff, on the 22nd of July, 1875, took possession of the stock in trade described in the mortgage, and was by his bailiff in actual possession, when the defendant Maughan, on the 28th of July, 1875, under the writ of attachment, took forcible possession of the goods, turned the plaintiff out of possession, and afterwards, it was said,

delivered possession of the goods to the assignee in insolvency of Cole.

This was the alleged trespass and conversion.

The other two defendants acted for Maughan, the sheriff, as his bailiffs.

The stock so taken was of the value of \$7,000.

The counsel for the defendant submitted that the plaintiff was not entitled to recover:—1. Because Caton had no power to sign the mortgage for Caton & Cole. 2. Because Cole was annoyed when he heard of it. 3. Because, even if ratified by Cole, that was not sufficient execution as against the creditors. 4. Because it was not sealed. 5. Because the description in it was insufficient. 6. Because it was a mortgage to secure a future debt, and not under the statute. 7. Because there was no sufficient delivery of the goods. 8. Because the mortgagee had no right to take possession until default. 9. Because the form used was not applicable to the facts. 10. Because the notes were not properly stamped.

Leave was given, if necessary, to put double stamps on the notes.

The objections were overruled. The defendant then put in and proved the writ of attachment against Cole as an absconding debtor.

The order for the writ of attachment was dated on the 22nd July, 1875, and signed on the 23rd July, 1875.

The supposed debt, in respect to which it was issued, was a note made by William Cole on May 25, 1875, for \$2,226, in favour of McClean Brothers, at sixty days, and so not due till several days after the issue of the writ of attachment.

The liability, in respect of which the note was given, was said to be a liability of Caton & Cole.

In the affidavit for the issue of the writ of attachment the debt was sworn to be that of William Cole, and in respect of a quantity of hams previously sold by McClean Brothers to Cole.

Cole, when the note was dated, carried on a pork busi-

ness in his own name, separate and apart from the business of Caton & Cole.

There was evidence that Cole, on his return to Owen Sound having heard of the mortgage, was apparently annoyed at the giving of it, but did not question the power of Caton to give it or repudiate it.

The defendants' counsel renewed his objections on the whole case, and, in addition, submitted :—

1. The writ of attachment was a justification, even if the mortgage was valid.

2. The sheriff was protected by the writ of attachment.

It was then agreed between the parties that a verdict should be entered for the plaintiff for \$1,826.25, with leave to defendant to move to enter a nonsuit or verdict for defendant on the objections taken to the plaintiff's recovery, the Court, if necessary, to have power to draw inferences, like a jury, from the facts.

During Michaelmas term, November 17, 1875, *J. K. Kerr* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit or verdict for defendants entered, pursuant to leave reserved by the learned Chief Justice before whom the cause was tried, upon the grounds stated at the trial; or why the verdict should not be reduced to a nominal sum, on the ground that the goods, which were the subject of the action, were taken out of the custody of the defendants by the assignee in insolvency, who held the goods for the benefit of the plaintiff and the other creditors of the insolvents, Caton & Cole, through whom the plaintiff claims; and upon grounds disclosed in affidavit filed. The affidavit filed shewed that on the 17th of August, 1875, the assignee in insolvency of Cole made a demand on the defendant Maughan for the goods, "on the ground that the said William Cole had made a voluntary assignment to him under the Insolvent Act of 1869," and that as such assignee he was entitled to the possession of the said stock; and that on the 18th of August, 1875, the defendant Maughan complied with the demand.

During Hilary term, February 18, 1876, *Creasor* and *Osler* shewed cause. Caton had authority to execute the mortgage in the name of the firm: *Lindley* on Partnership, vol. i., 2nd ed., 291, 292; *Parsons* on Partnership, 2nd ed., 178, 179; *Tapley v. Butterfield*, 1 Metc. 515; *Ex parte Copeland*, 3 Dea. & Chit. 199, 216. There was evidence of subsequent ratification: *Cragg v. Ford*, 1 Y. & C. C. C. 280; *Ex parte Copeland*, 3 Dea. & Chit. 199; *Burt v. Moulton*, 1 Cr. & M. 525, 530; *Cheeseman v. Sturges*, 9 Bosw. N. Y. 246; *Broom's Legal Maxims*, 5th ed., 867. The mortgage of chattels was valid, although not by deed: *Flory v. Denny*, 7 Ex. 581; *Halpenny v. Pennock*, 33 U. C. R. 229. The goods were sufficiently described in the mortgage (defendants' counsel abandoned this objection). The security is good either under Consol. Stat. U. C. ch. 45, secs. 1, 2, 5, or independently of it. If a security for notes to be given is not under the statute, the security is good independently of the statute: *Baldwin v. Benjamin*, 16 U. C. R. 52; *Valentine v. Smith*, 9 C. P. 59; *Mathers v. Lynch*, 28 U. C. R. 354, 362; *Beecher v. Austin*, 21 C. P. 334, 346; *Clark v. Bates*, *Ib.* 348. The subsequent acquirement of possession by the plaintiff cured all defects, if any, in the mortgage. The mortgage was good between the parties; and the sheriff should have proved the debt as well as judgment to avoid the security, and there was no proof of the debt at the time of the issue of the attachment: *Grant v. McLean*, 3 O. S. 443, 447; *Powers v. Ruttan*, 4 O. S. 58; Consol. Stat. U. C. ch. 25, sec. 2; *Ib.* ch. 24, sec. 5. There was no re-demise in the mortgage, and so the mortgagee had a right at any time to take possession: *McAulay v. Allen*, 20 C. P. 417; *Porter v. Flintoff*, 6 C. P. 335; *Ruttan v. Beamish*, 10 C. P. 90. The official assignee was not entitled to possession of the goods as against the plaintiff: *Leith v. Freeland*, 24 U. C. R. 132; *Jameson v. Kerr*, 8 C. L. J. N. S. 240; *Burke v. McWhirter*, 35 U. C. R. 1; *Dumble v. White*, 32 U. C. R. 601; *Archibald v. Haldan*, 31 U. C. R. 295; *Crombie v. Jackson*, 34 U. C. R. 575, 583. There is nothing in the objection as to stamps: *House v. House*, 24 C. P. 526.

C. Robinson, Q. C., and *Kerr*, Q. C., contra. The mortgage was invalid under the statute: *Mathers v. Lynch*, 28 U. C. R. 354; 1 *Hilliard* on Mortgages, 4th ed., 310; *Boulton v. Smith*, 17 U. C. R. 400; *Turner v. Mills*, 11 C. P. 366. The plaintiff is only entitled to nominal damages: *Mayne* on Damages, 2nd ed., 312, 313; *Brown v. Wright*, 35 U. C. R. 378; *Hobson v. Thelluson*, L. R. 2 Q. B. 642; *Sedgwick* on Measure of Damages, 6th ed., 690, 691; *Leggett v. Baker*, 13 Allen 470; *Pierce v. Benjamin*, 14 Pick. 356; *Strange v. Dillon*, 22 U. C. R. 223; *Walker v. Niles*, 18 Grant 210; *Reynolds v. Williamson*, 25 C. P. 49; Insolvency Act of 1869, sec. 60; *Atkinson* on Sheriffs, 5th ed., 309, 310; *Moon v. Raphael*, 2 Bing. N. C. 310; *Jones v. Dowle*, 9 M. & W. 19. Caton had no power to execute the mortgage: *Cameron v. Stevenson*, 12 C. P. 389; *Holme v. Allan*, Tay. 348. The mortgage is void because the notes were not duly stamped: *Watts v. Robinson*, 32 U. C. R. 362.

June 29, 1876. HARRISON, C. J.—In this case we have the same power as a jury to draw inferences from facts.

The first objection is, that Caton had no power to execute the mortgage on the partnership effects, being personalty, so as to bind the partnership property.

A member of a trading co-partnership has authority to borrow money on the credit of the firm for partnership purposes. And from this power it follows almost necessarily that he should have power to pledge partnership property as a security for advances: *Lindley* on Partnership, vol. i., 3rd ed., 301.

The implied authority of a partner having power to borrow, to pledge the personal property of the firm for money borrowed, is beyond dispute, and the power is not confined to cases in which there is a general partnership. *Ib.*

But this power does not enable a partner, without the express consent of his co-partner, to execute a deed disposing of all the stock in trade for the general benefit of the creditors of the partnership: *Cameron et al. v. Steven-*

son, 12 C. P. 389; "for such an assignment would seem to amount of itself to a suspension or dissolution of the partnership" itself: *Story on Partnership*, 6th ed., sec. 101.

There is a difference between borrowing for the purpose of carrying on the business, and doing an act which *per se* puts an end to the business.

There may, on well understood principles of agency, of which the law of partnership is a branch, be the implied power to do the former when no power in the nature of things could be implied to do the latter.

In this case, however, there was not only evidence of the express authority to borrow, but evidence of ratification as to the means used to borrow.

When one partner authorizes another to obtain an endorser for the purpose of raising money from a bank for the use of the firm, he thereby authorizes his partner to do whatever is reasonably necessary for the purpose: See *Halpenny v. Pennock*, 33 U. C. R. 229.

Without the evidence of ratification there is enough shewn here to authorize all that Caton did in the name of Caton & Cole, in order to obtain the endorsement of the plaintiff on the three promissory notes, required for the immediate use of the business of the partnership.

But coupling this with the evidence of ratification, and regarding the facts as jurors, we cannot do otherwise than find, if necessary, an authority in fact.

The first objection therefore fails, and with it the second and third objections, for these are branches only of the main or first objection.

The mere annoyance of Cole when he heard of the mortgage, which he in no manner expressed to the plaintiff, the holder of the mortgage, cannot without more be deemed a repudiation of the act of Caton.

If the mortgage was ratified for any purpose it was ratified for all purposes, and so far as the mere execution of it is concerned, is as binding on creditors as on the partners.

Ratification or no ratification, the mortgage was, we think, properly executed by Caton in the name of the firm.

so as to bind the firm to the same extent and with the same effect as if it had been severally executed by each of the partners.

The fourth objection is, that the mortgage was not sealed. There is nothing in this objection. It is now firmly settled that there may be a mortgage of chattels without deed: *Reeves v. Capper*, 5 Bing. N. C. 136; *Flory v. Denney*, 7 Ex. 581; *Halpenny v. Pennock*, 33 U. C. R. 229.

The fifth objection, as to the alleged insufficiency of the description, was abandoned during the argument.

The sixth objection is, that the mortgage is void, as having been given to secure a future liability.

Such a mortgage is perfectly good as between the parties: *Hilliard on Mortgages*, vol. i., 4th ed., 310.

It is also, according to decided cases in this Province, good as against creditors.

If the statute which provides for the filing of bills of sale and chattel mortgages is inapplicable to such a mortgage, the mortgage cannot be avoided by the statute: *Baldwin v. Benjamin*, 16 U. C. R. 52; *Valentine v. Smith*, 9 C. P. 59; *Beecher v. Austin*, 21 C. P. 334; *Clark v. Bates*, *Ib.* 348.

Where a security is good independently of the statute, we cannot hold it void unless the statute clearly apply to it and make it void.

The statute only provides for the filing of such bills of sale and chattel mortgages as are mentioned and described in it.

The mortgage here does not apparently come under any of the sections of the statute.

The section which most nearly approaches to it, is sec. 5, which provides for the case of an agreement in writing for future *advances*—not future endorsements—for the purpose of enabling the borrower to enter into and carry on business with *such* advances; or the case of a mortgage to secure the mortgagee against the endorsement of any bills or promissory notes, or any other liability by the mortgagee *incurred*—not to be incurred.

The statute as framed does not in language apply to a liability *to be* incurred by endorsement of notes: *Mathers v. Lynch*, 28 U. C. R. 354, 362.

The consequence is, that the mortgage in question is excluded from the operation of the statute under the authority of *Baldwin v. Benjamin*, 16 U. C. R. 52, followed and approved as that case is by the decisions already mentioned.

The security was good before the statute, and not being provided against in the statute, remains good, notwithstanding the provisions of the statute.

If the effect of this interpretation be to create or stimulate abuses, the remedy is obviously for the Legislature, not for the Courts.

It is now sixteen years since *Baldwin v. Benjamin* was decided, and yet the Legislature have not found it necessary to interfere.

From this it may be inferred that there has been no such abuse as to call for the interference of the Legislature.

We need not say in what manner we would feel disposed to decide the point if the matter were *res integra*.

The point is, we think, settled so far as this Court is concerned by *Baldwin v. Benjamin*, and the decision of this Court has been fully adopted by the Court of Common Pleas.

But we are not at all clear that the defendant, as sheriff, has shewn such a standing as to entitle him to question the mortgage on behalf of or in the place of creditors.

In *Grant v. McLean*, 3 O. S. 443, which was an action of trespass against a sheriff for seizing the goods of the plaintiff under an attachment under the Absconding Debtors' Act against the goods of a third party, by whom they had been sold to the plaintiff before the attachment, it was held that the sheriff, without proof of the debt at the time the attachment issued, could not raise the defence that the sale was void against creditors.

This decision has never, so far as we can discover, been questioned in this Province.

It was recognized in *Powers v. Ruttan*, 4 O. S. 58.

It is in accordance with the principles since laid down by the English Court of Common Pleas in *White v. Morris*, 11 C. B. 1015.

There was no proof at the close of the plaintiff's case of any debt to found the attachment.

The evidence at the close of the defence, so far as it has any bearing on the point, shewed that no debt existed at the time the attachment issued.

The note given for the hams sold by McClean & Co. to Cole had not then matured, and until maturity, in the absence of fraud, the remedy for the contract price was suspended.

No such process can be issued under such circumstances during the currency of the paper taken for the debt.

The fact that such a note had been taken did not appear in the affidavits on which the attachment was ordered to issue. Had it appeared, we assume the order would not have been made. Its suppression, if intentional, was not proper conduct towards the learned Judge to whom the application was made.

It follows that the stock in trade at the time of the seizure and conversion by the sheriff was the property of the plaintiff, who had acquired it from Caton & Cole. The only authority which the sheriff had was to seize the property of Cole. Under that authority he seized and converted to his own use the property of the plaintiff. He is therefore, it appears to us, as against the objections so far raised, without defence.

The necessity for considering the seventh objection—that there was no sufficient delivery—depends on the decision of the former objections in favour of the defendants. As the former objections are decided against the defendants, it is unnecessary for the purposes of this objection to enquire whether, at the time of the execution of the mortgage, or at any time before the sheriff seized, there was a sufficient delivery of the goods mortgaged.

But this brings us to the eighth objection, which is, that the mortgagee had no right to take possession till default.

The mortgage contains no re-demise. It therefore operates as a conveyance of the goods mortgaged with the right to *immediate* possession. See *Porter v. Flintoff*, 6 C. P. 335; *Ruttan v. Beamish*, 10 C. P. 90; *McAulay v. Allan*, 20 C. P. 417.

There is nothing in the ninth objection, that the form of mortgage used is not applicable to the facts. It is applicable to the facts. The objection that being made applicable to the facts it is not covered by the statute, has already been disposed of.

Nor is there anything in the tenth objection, that the notes were not properly stamped. I said at the trial that if there were anything in the objection I would permit the notes to be double stamped, and the notes were then looked upon as double stamped.

Besides, I cannot see what right the sheriff, as representing an attaching creditor, has to raise this objection. Nor do I see that he has any right to do so, as representing the assignee in insolvency.

What are the facts? The plaintiff was in possession before the sheriff seized. The sheriff then assumed to represent the attaching creditor, but now assumes, on the affidavit filed, to represent the assignee in insolvency of Cole.

The attaching creditor could only seize subject to the lien of the plaintiff. The assignee could only take subject to the lien of the plaintiff. The plaintiff at the time of the seizure, being in possession of the goods as a pledgee, had a right to hold the goods against the mortgagors, and against their creditors, and against their assignee in insolvency, till his pledge is satisfied: *Re Coleman*, 36 U. C. R. 559.

The right of the assignee to take possession of the goods of the debtor, subject to a mortgage only, arises where the goods at the time of the assignment are in the possession of the debtor: *Archibald v. Haldan*, 30 U. C. R. 30; *S. C.*, 31 U. C. R. 295; *Dumble v. White*, 32 U. C. R. 601; *Crombie v. Jackson*, 34 U. C. R. 575; *Burke v. McWhirter*, 35 U. C. R. 1.

The sheriff, it seems to me, had no right, either as representing the attaching creditor or the assignee, to deprive the plaintiff of the possession of the goods without satisfying the amount of the lien.

The goods at one time belonged to Caton & Cole. That firm, for a perfectly good and perfectly honest consideration, mortgaged them to the plaintiff. What right had the assignee of one of the firm to seize the goods? It was said that some sale had taken place just before one of the partners absconded by one of the partners of his interest in the stock to the remaining partner.

I believe there was such a transfer in fact, but it was made under such circumstances that the county Judge afterwards held it void as against the joint creditors, and I afterwards affirmed his decision (a).

The conduct of the sheriff under the circumstances was incomprehensible. He had no right, under process against the goods of Cole, to seize the property of the plaintiff. His subsequent disposal of the goods by handing them to the assignee of one of the partners of the firm of Caton & Cole, has not, in our opinion, at all strengthened his position. Having wrongfully seized the goods he should have returned them to the plaintiff, who was the true owner. Had he done so, there would have been some ground for asking to have the damages reduced.

In *Moon et al. v. Raphael*, 2 Bing. N. C. 310, the delivery of the goods was to the *plaintiff* in the action of trover, and he accepted the delivery without condition. This was held to be a ground for reducing the damages to nominal damages in a case where there was no allegation of special damage in the declaration.

So in *Williams v. Archer*, 5 C. B. 318, which was an action in detinue, the delivery was to the *plaintiff*, and this was held to be a proper subject for the consideration of the jury in mitigation of damages.

But where the delivery is not to the plaintiff, but to some third party who has some supposed claim to the goods, we

(a) *Re Caton and Cole*, 26 C. P. 308.

are unable to understand on what principle the damages should be less than the interest of the plaintiff in the goods at the time of the trespass or conversion.

In *Gillard v. Brittan et al.*, 8 M. & W. 575, where the seller of goods, which had been paid for according to contract, retook them, it was held in an action of trespass for the taking of the goods, that the plaintiff was entitled to the full value, and that the jury could not, in estimating the damages, take into consideration the debt due to the defendants.

In *Chinery v. Viall*, 5 H. & N. 288, the ruling was different, the defendant being proved to be an unpaid vendor, from whose possession the goods never were taken by the vendee, and who wrongfully sold to another.

In *Keen v. Priest*, 4 H. & N. 236, where the owner of sheep seized under a distress for rent, which was unlawful, because there were other goods on the premises belonging to the plaintiff liable to distress, it was held that the plaintiff was entitled to recover the full value of the sheep distrained.

So in *Attack v. Bramwell*, 9 Jur. N. S. 892, *S. C.*, 3 B. & S. 520, it was held that where a landlord distrains the goods of his tenant in such a manner as to render himself a trespasser *ab initio*, the measure of damages is the full value of the property seized.

In the latter case, Cockburn, C. J., said, 9 Jur. N. S. 693: "I think it must be taken, that where a man, under colour of legal authority, as in the case of a distress for rent, does that which makes him a trespasser *ab initio*, he is in the same position as a total stranger acting without authority. The defendant, then, being in the position of a stranger, and having broken into the plaintiff's house, and seized his goods, it certainly does not lie in *his* mouth to say *he* has applied the goods for the benefit of the party bringing an action for the trespass. The latter has a right to insist upon being restored to his former position, and to decline any benefit which the other side may attempt to impute to him, which seems to me to form the subject of an entirely separate and distinct question."

So in *Edmondson v. Nuttall*, 17 C. B. N. S. 280, where the defendant wrongfully detained certain looms of the plaintiff, obtained judgment against the plaintiff, and afterwards seized the looms under execution, it was held that in an action for wrongful conversion the liability of the looms to process, and the fact that by the wrongful seizure the plaintiff's debt was apparently satisfied, were circumstances which the jury could not take into consideration in estimating damages.

Willes, J., said, p. 295: "I cannot help thinking that we should be violating the rule of law which prohibits a man from taking advantage of his own wrong, if we were to hold that the defendant's execution was to have a greater advantage or be more beneficial to him by reason of his wrongful act in seizing and detaining the plaintiff's goods for the purpose of making them amenable thereto. There clearly was nothing like a re-delivery of the goods to the plaintiff here. So long as law shall endure, parties cannot be allowed to be judges or bailiffs in their own cases. In all cases, save the exceptional one of a distress, the final process of the law is to be executed by the officers of the law. A person who has in violation of law taken upon himself to seize goods which he has no right to, ought not to be allowed to come and ask for any favour or encouragement, which we should in effect be allowing if we held that the subsequent seizure under the County Court process could *qualify* the defendant's wrongful act of detaining the goods on the previous day."

In *Mayne* on Damages, 2 ed. 312, it is said: "The defendant may shew that the plaintiff had not an interest in the goods to their full value, and that the residue of the interest was in himself. * * * But this would be no defence, even in mitigation of damages, when the residue of interest was not in the defendant, but in some third person."

In trespass or trover the general rule as to damages is the full value of the goods, or of the plaintiff's interest in the goods, at the time of the trespass or conversion: See *McAulay v. Allen*, 20 C. P. 417.

Where, after the wrong committed, there has been some reparation of the wrong by the restoration of the goods to the possession of the person from whose possession they were wrongfully taken, the damages may be mitigated. But in this case there is no pretence for the contention that by anything the sheriff did the goods were ever restored or re-delivered to the plaintiff.

In such a case the general rule as to damages must apply.

Actions like *Hobson et al. v. Thelluson*, L. R. 2 Q. B. 642, against a sheriff for negligence in not levying, and which cannot be maintained without actual pecuniary damage, stand upon an entirely different footing, and are inapplicable here.

In our opinion the verdict in this case, which is only for the amount of the plaintiff's interest in the goods at the time of the trespass or conversion, and which by the conduct of the defendant have become wholly lost to him, should stand, and the rule *nisi* be discharged.

But as the defendant, the sheriff, does not appear to have been indemnified by anybody for what he did, we think it only right, under the circumstances, that, as a condition of the discharge of the rule, the plaintiff should assign to the sheriff his, the plaintiff's, interest in the mortgage, in order that the sheriff, by proof against the estate, or by some other appropriate proceedings, may, if possible, recoup himself for the damage, or some portion of the damage, which he sustains in the present action.

MORRISON, J., and WILSON, J., concurred.

Rule nisi discharged on terms.

THIBAudeau ET AL., EXECUTORS OF JAMES MAIR, v. SKEAD.

Survey—Variations of compass.

Defendant claimed under a timber license which described his limits as bounded on the south by "the continuation of a line from the head of Mud Lake on the course North 54° E., formerly the boundary between T. C. and A. R. M." The plaintiff claimed under a license which gave his northerly limit as the same line, describing it also as running N. 54° E. Both licenses were renewals of previous licenses from about 1839.

Held, that the boundary between them was the true astronomical line N. 54° E.; and that the plaintiff could not claim according to a line run in 1874 N. 54° E. magnetically, making no allowance for the variations of the compass.

TROVER for 2,500 pine saw logs, which said saw logs were alleged to have been cut during the season of 1873-4 upon the location described in number sixty-eight of the season of 1873-4, which license is dated Ottawa, 25th June, 1873, and was issued to the plaintiffs as executors, as aforesaid, by A. J. Russell, Crown Timber Agent, by authority of Consol. Stat. U. C. ch. 23, 34 Vic. ch. 19 O., and the Crown Timber Regulations, dated 16th April, 1869.

The pleas were :

1. Not guilty.
2. Denial of the plaintiffs' property.
3. Traverse of the issue of the license to the plaintiffs as executors.

Issue.

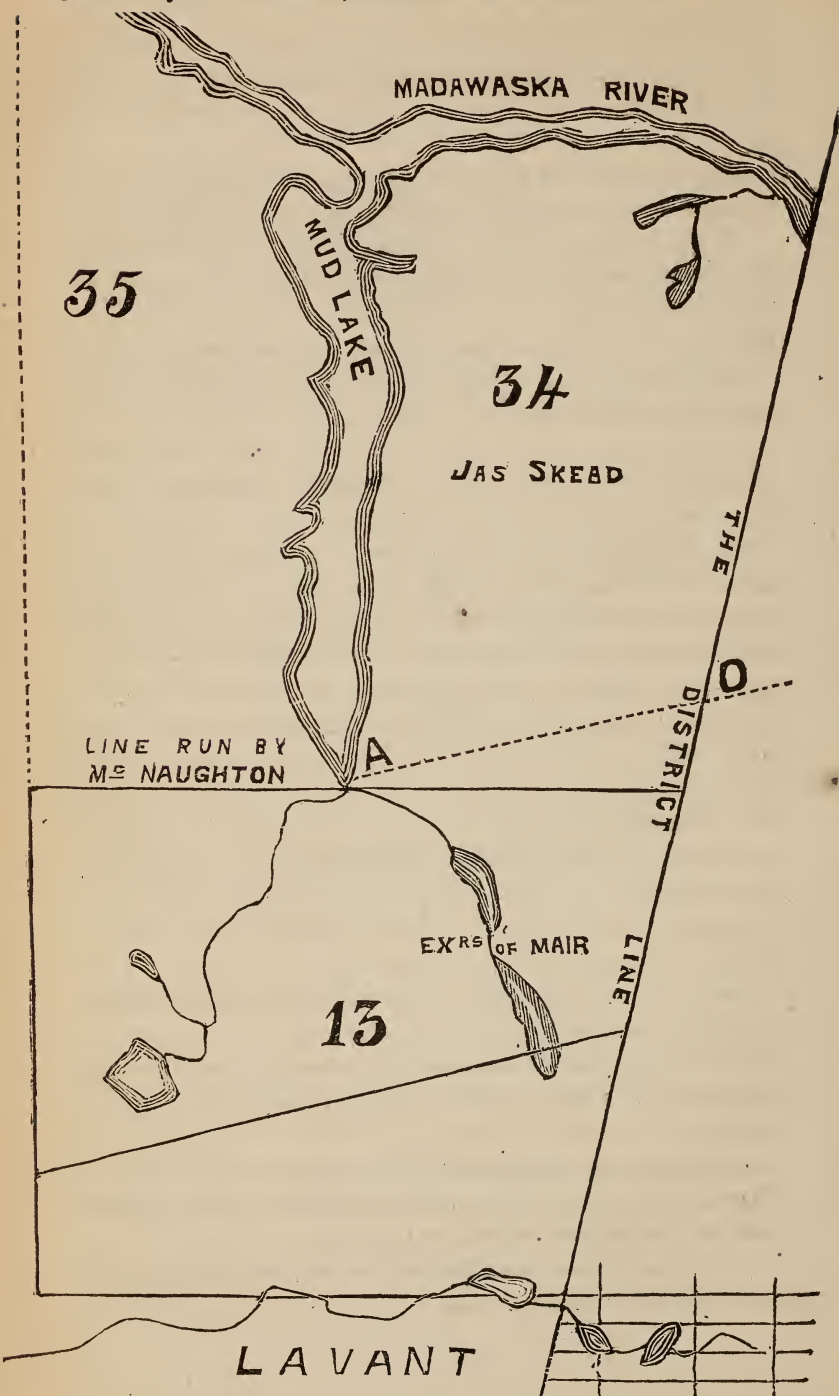
The cause was tried at Perth, at the last Fall Assizes, by Patterson, J., without a jury.

The question tried was, as to the boundary line between the plaintiffs' timber limits and the defendant's timber limits.

Both limits are shewn in the plan on the next page.

The defendant's location lies immediately to the east of Mud Lake, and is described on the plan as No. 34.

The plaintiffs' lies immediately to the south, and is described on the plan as No. 13.



Plaintiffs claimed that their northern boundary was the dotted line, and defendant claimed southerly to an extension of the line described in the plan as the MacNaughton line.

The piece of land in dispute between the parties was the triangular piece of land shewn between these lines.

The license under which the plaintiffs claimed was dated 25th June, 1873. The location was described as follows: "To extend from where a line crosses the creek coming into the head of Mud Lake, *on the course north 54° east* to the District line, and south 36° east, four miles more or less, to a continuation of the line between lots 20 and 21 in the township of Lavant, bounded by said continuation of line to the District line, and by the District line to lot No. 1 in the township of Blythefield."

The license under which the defendant claimed was dated 30th June, 1873. The location was described as to commence about a mile above the District line, at a boundary marked on the south side of the Madawaska River, and extending up the river three miles more or less to Mud Lake, and back on the east side of Mud Lake four miles or less on the course south 36° east to the District line, *and the continuation of a line from the head of Mud Lake on the course north 54° east, formerly the boundary between John Cunningham and Angus Roy McDonell.*

The portions of each description in italics are intended by the licenses to describe one and the same line.

The boundary line between Cunningham and McDonell, referred to in the last-mentioned location, was a line which existed forty years since, and which was intended at that time to be N. 54° E. on the then magnetic bearing, and which was actually run on the ground at the instance of Cunningham and McDonell in or about 1839, and was afterwards produced by astronomical observation, so as to form the defendant's southern boundary.

The licenses proved at the trial were renewals issued for the respective locations from 1839 or thereabouts, and the

course of the line in all of them was described as "North 54° East."

It was not contended by the plaintiffs that the line they claim was the true astronomical line, North 54° East; but they claimed to hold to a line which the compass in 1874 indicated as that magnetic bearing, whether the true line or not.

On 16th February, 1874, instructions were sent from the Department of Crown Lands, at Toronto, to John Morris, Esq., a provincial land surveyor, to run the line between the locations in question.

The instructions to Morris, the surveyor, were, to proceed to Mud Lake and "survey the line between the timber berths of William Caldwell and the defendant Skead, being Nos. 179 and 235 of the year 1866-67."

Copies of plans and descriptions of the licenses, and others adjoining, as also letters and field notes relating to certain lines in the locality, were sent to him for his guidance in the work to be done.

He was required to make diligent search for the monument at Mud Lake, being the point of commencement, marked A on the plan.

His attention was especially drawn to the fact that the course of the line to be drawn from that point, as given in the license, was North 54° East.

He had no difficulty in finding the starting point, A. There was no dispute about it. He commenced at that point and ran North 54° East, magnetically, to point O, on the plan, without, so far as the evidence shewed, making any allowances whatever for the variations of the needle of the compass.

He had never been on the ground before, and had no previous knowledge of the neighbourhood.

John McNaughton, who was a provincial land surveyor from 1836 to 1846, was called as a witness for the defence. He was Deputy Surveyor-General of Woods and Forests. He made descriptions for timber licenses every year. He used to scale the rivers in the spring, in order to make de-

scriptions without clashing. He remembered that Angus Roy McDonell had a license for 35, and John Cunningham for 13; that there had been a dispute between them; and that he, in 1840 or 1841, went up and determined the boundary between them. He determined the point A, and ran a line from that point westerly. McDonald was not interested east of point A. He blazed the line which he ran. He swore that a line continued now North 54° East by the compass would not, owing to the variations of the compass, be a continuation of his line.

Mr. *Skead*, the defendant, was also called as a witness. He first knew the place in question in 1841. He then purchased the lands from one Chapman. He went on to cut hay and make timber. In 1842 he had occasion to look for boundaries, and found a line where it crossed the creek running into Mud Lake. He could not find a line for any distance eastward from the creek. He was able to trace the line on the west, though somewhat obscure. He said the line run by Morris would form a crooked line with the old line, and that a line run straight in continuation of the old line would give him the land where the trees were cut.

In the spring of 1843, Mr. Falls, at the instance of McRae, ran out the line. It was a continuation of McNaughton's line and had frequently been reblazed since.

Defendant had been in possession north of that line ever since it was run.

Both he and McRae cut up to that line.

McRae sold to Mair twelve or thirteen years since. In 1860, Mair cut eighteen trees north of that line, but afterwards paid defendant \$32 for the trespass.

Mair died in April, 1872. His limits were sold by auction on 25th July, 1872, to the plaintiffs.

The plaintiffs claimed the boundary line to be that run by Morris, whereas the defendant claimed the boundary to be the astronomical line N. 54° E.

The learned Judge adopted the latter contention, and entered a verdict for the defendant, reserving leave to the

plaintiffs to move to enter a verdict for \$300, the full amount claimed in their declaration, if the Court should be of a contrary opinion.

During Michaelmas term November 17, 1875, *Bethune* obtained a rule calling on the defendant to shew cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiffs for such sum as the Court should think fit to order, and to shew cause why the record should not be amended by claiming \$3,000 damages in the declaration, on the ground that by inadvertence in the record the claim is stated in the declaration at \$300 instead of \$3,000; or why there should not be a new trial between the parties, on the ground that the verdict is against law and evidence.

During Hilary Term February 22, 1876, *Richards, Q.C.*, shewed cause. He cited Consol. Stat. U. C. ch. 93, sec. 32; Consol. Stat. U. C. ch. 77, sec. 84.

Bethune supported the rule. He cited *Gilmour v. Buck*, 24 C. P. 187; *McMullen v. McDonell*, 27 U. C. R. 36; Taylor on Evidence, 6th ed., secs. 1061, 1063.

May 15, 1876, HARRISON, C. J.—We think the learned Judge was right in his finding on the evidence given at the trial.

There is but one line known as “North 54° East.”

The question is, as to the situation of that line on the surface of the earth.

There are at least two modes of ascertaining it: the one by astronomical observation; the other by magnetic bearing.

Of the two, the former is the more correct, for the reason that the compass varies from year to year.

It cannot be that the line which in 1840 was “North 54° East,” is in a subsequent year to be taken as a different line, because of the variations of the compass.

These variations are well known to surveyors, and were proved at the trial in this cause.

McNaughton, in speaking of them, said that the variations are about three minutes a year; that is to say, in twenty years there would be about a degree of variation.

When accurate observations on the variation of the needle in the same place are continued for several years, it is found that there is a continual and tolerably regular increase or decrease of the variation.

The most ancient observations, according to *Gillespie* on Land Surveying, 4th ed. p. 204, are those taken in Paris. In the year 1541, the needle pointed 7° East of North. In 1580, the variations had increased to $11\frac{1}{2}^{\circ}$ East, being its maximum. The needle then began to move westward, and in 1666 it had returned to the meridian. The variations then became West, and continued to increase till, in 1814, it attained its maximum, being $22^{\circ} 34'$ West of North. It is now said to be decreasing, and in 1853 was $20^{\circ} 17'$ West.

In London, the variation, according to the same authority, in 1576, was $11^{\circ} 15'$ East; in 1662, 0° ; in 1700, $9^{\circ} 4'$ West; in 1778, $20^{\circ} 11'$ West; in 1815, $24^{\circ} 27'$ West; and in 1843, $23^{\circ} 8'$ West.

In the United States, the north end of the needle was, according to the same authority, moving eastward at the earliest recorded observations, and continued to do so till about the year 1810 (variously recorded as from 1793 to 1819), when it began to move westward, which it has ever since continued to do. Thus in Boston, from 1708 to 1807, the variation changed from 9° West to $6^{\circ} 5'$ West, and from 1807 to 1840 it changed from $6^{\circ} 5'$ West to $9^{\circ} 18'$ West.

A table of the variations in various parts of the United States will be found in *Gillespie* on Land Surveying, 4th ed., p. 205.

The author mentions, at p. 208, a remarkable case, without naming it, which recently came before the Supreme Court of New York.

The north line of a large estate was fixed by a Royal grant, dated 1704, as a due east and west line. It was run out in 1715 by a surveyor. It was again surveyed in 1765 by another surveyor, who ran a course North 87° East. It

was run a third time, in 1789, by a third surveyor, who adopted the course North $86^{\circ} 18'$ East. In 1845 it was surveyed for the fourth time by a fourth surveyor, with a course North $80^{\circ} 30'$ East. He found old courses and blazes of a former surveyor in his line. Each of these lines was run by the compass.

The question was, as to the situation of the true line.

There were no old records of variation at the precise locality, but it lies between the lines of equal variation which pass through New York and Boston, its distance from the Boston line being about twice its distance from the New York line.

The records of those two cities were therefore used, and the result of the investigation was, that the second surveyor retraced correctly the line of the first, the third surveyor ran out an entirely new line, and the fourth surveyor correctly retraced the line of the third, and found his marks; but as this line was wrong originally, the fourth surveyor was held to be incorrect.

All the surveyors ran their lines on the supposition that the original due east and west line meant east and west as the needle pointed at the time of the survey.

The preponderance of the testimony as to old landmarks agreed with the results of the above reasoning, and the decision of the Court was in accordance therewith.

The only complete remedy for the disputes and the uncertainty of boundaries resulting from the continued change in the variation of the needle, where the compass is used, is said to be that first suggested by Rittenbond, afterwards, in 1822, recommended by Sopworth, by Johnson in 1831, and by Roberts, of Troy, in 1839, and given by Gillespie at p. 210 of his instructive and useful work on Land Surveying.

It is, that a meridian, *i. e.*, a north and south line, be established in every town or county by the authority of the state, monuments, such as stones, set deep in the ground, being placed at each end of it. Let every surveyor be obliged by law to test his compass by this line at least once in each year. This he could do as easily as taking

the bearing of a fence, by setting his instrument on one monument and sighting to a staff held on the other. Let the variation thus ascertained be inserted in the notes of the survey, and recorded in the deed. Another surveyor years or centuries afterwards, could test his compass by taking bearings of the same monuments ; and the difference between this and the former bearing would be the change of variation. He could thus determine with entire certainty the allowance to be made in order to retrace the original line, no matter how much or how irregularly the variation may have changed, or how badly adjusted was the compass of the original survey.

To succeed in tracing old lines, proper allowance must be made for the change of variations since the date of the original survey, according to a rule laid down at p. 208 of Gillespie.

It is clearly impossible, owing to the variations of the needle, at long intervals of time, to retrace or produce old lines run by the compass, without knowing of the variations of the compass, and making proper allowance therefor.

The neglect of this precaution by surveyors is, as pointed out at p. 207 of *Gillespie's Treatise*, the source of a great part of the litigation among farmers respecting their lines.

The present lines of equal variation are moving westward, producing the change of variation (increasing the westerly and lessening the easterly), which is different in different parts of the country, and is about five or six minutes in the North-Eastern States, three or four minutes in the Middle States, and two minutes in the Southern States : *Gillespie on Land Surveying*, p. 205.

The line according to which the defendant claims appears to be a continuation of the line run by McNaughton, which, at that time, was North 54° East by the compass, and, according to the evidence, as we understand it appears, to have been since established by at least one surveyor by means of astronomical observation.

The line called for by the licenses is not only a line

North 54° East, but "the continuation of the line which was formerly the boundary between Cunningham and McDonell."

In order, therefore, to find the boundary between these localities, it would appear to be necessary not only to run a line North 54° East, but so to run as to extend the line which was formerly the boundary between Cunningham and McDonell on the course North 54° East.

This may be done with the compass, making the proper allowances for variation of the needle, or by astronomical observation.

It does not appear that Morris made any allowance whatever for the variation of the needle. The consequence is, that, instead of extending the old boundary line, he has projected an entirely new line at a different angle.

The line North 54° East is the proper line, whether the license be read by itself or in reference to the surrounding circumstances.

If we look at the surrounding circumstances, we must say that the course originally intended is that still intended by the description North 54° East, and certainly not a course varying from year to year with the variations of the compass.

Morris was instructed to run a line between the locations in question, under the licenses of 1866-7. He was furnished with old descriptions and plans shewing that the North 54° East, which he was to run, was the line known as such as long since as about 1840 by the magnetic bearing of that year or of that period.

He ran the line with the compass in 1874 with the magnetic bearing of 1874, and produced a result which was not, we think, either justified or contemplated by his instructions.

The onus is upon the plaintiffs to shew that the line according to which the defendant cut timber, as being part of his location, is erroneous. The evidence which they adduced in support of that contention fails to establish it. See *Doe d. Strong v. Jones*, 7 U. C. R. 385.

The verdict, therefore, was rightly found for the defendant.

But, if the plaintiffs desire it, we see no objection to setting aside the verdict and entering a nonsuit.

MORRISON, J., and WILSON, J., concurred.

Rule accordingly.

REGINA V. WILLIAMS.

Statute of Limitations—Land vested in the Crown in trust.

The Statute of Limitations does not run against the Crown, and it makes no difference that the land is vested in the Crown as trustee. Where therefore, in ejectment by the Crown for land held as trustee for the University of Toronto, under C. S. C., ch. 62, sec. 65, it appeared that defendant had had possession for twenty-seven years, the plaintiff was nevertheless held entitled to succeed.

EJECTMENT for lot No. 15, 8th concession Camden, in the county of Lennox and Addington..

The plaintiffs claimed by a patent from the Crown to "The Chancellor, President, and Scholars of King's College, of York, in the Province of Upper Canada," who were afterwards, by 16 Vic. ch. 26, formed into the University of Toronto. By statute of Canada, 16 Vic. ch. 89, sec. 46, and Consol. Stat. U. C. ch. 62, sec. 65, the said land, among others, was vested in the Crown in trust for the said University.

The grant from the Crown was made subject to the lease to one John Wilson Ferguson.

Defendant claimed by purchase from one Daniel McTaggart, who claimed as assignee of the said John Wilson Ferguson, who obtained a lease of the lot from the Crown on the 28th of April, 1819, which expired on the 24th June, 1840; and by twenty-seven years uninterrupted possession.

The action was tried at the Spring Assizes, 1875, held at Napanee, before Kenneth McKenzie, Q. C., sitting for Richards, C. J.

The evidence shewed that defendant had held uninterrupted possession for twenty-seven years.

The jury, under the direction of the learned Queen's Counsel, found a verdict for the defendant, on the ground of possession for over twenty years; but leave was reserved to the plaintiff's counsel to move to enter a verdict for the plaintiff, on the ground that the Statute of Limitations could not run against the Crown.

In Easter term, May 19, 1875, *C. Robinson*, Q. C., obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be entered for the plaintiff, on the grounds, among others, that the said verdict was against law and evidence, and on the ground of misdirection of the learned Queen's Counsel who tried the case, in stating that there was evidence of possession that would entitle the defendant to succeed against the plaintiff, the plaintiff not being affected by the Statute of Limitations.

In Michaelmas term, December 2, 1875, *Bethune* shewed cause. The Attorney-General should have been the plaintiff—he would be in equity. Ejectment will not lie at the suit of the Crown, and if it will, the action must be brought within twenty years after the right of entry. The defendant has improved the land, and is willing to pay for it with interest. The Crown could not, but for 35 Vic. ch. 13, sec. 18, O., bring this action, and having by that Act assumed the position of an ordinary suitor, it must submit to the limitations imposed on such suitors. He cited *Brown on Limitations* 543; Consol. Stat. U. C., ch. 62.

C. Robinson, Q. C., contra. The Attorney-General directed the ejectment, and that is sufficient. The Ontario statute provides that the procedure in use between subject and subject, is to apply where Her Majesty claims, but it relates only to procedure, and cannot affect the rights of the Crown. The Statute of Limitations does not apply to the Crown, which is always supposed to be in possession of its lands, and could not till the late statute bring ejectment. Intrusion always presupposed that

some one came in along with the Crown. If the land is vested in the Crown by 16 Vic. ch. 89, and Consol. Stat. U. C., ch. 62, sec. 65, it is clear the Statute of Limitations does not apply, and the fact that the Crown holds as trustee can make no difference. [MORRISON, J.—The rule was granted on the suggestion that this fact would affect the operation of the statute.] There is no ground or authority for any such contention. Though the Crown may be a trustee, the power of enforcing the trust seems doubtful: *Lewin on Trusts*, 6th ed., 29.

HARRISON, C. J.—It is unnecessary to reserve our decision in this case. No right to real estate once vested in the Crown is to be lost at the common law by mere lapse of time. This is still the law where the right of the Crown is not expressly limited by statute. The first statute, 1 Jac. I., cap. 14, enabled a defendant who relied upon his possession to shew that the Crown was out of possession for twenty years. This is applicable to such a case as the present: *Regina v. McCormick*, 18 U. C. R. 131. The only statute then applicable is the *Nullum Tempus* Act, 9 Geo. III., ch. 16; but that statute requires sixty years possession to bar the Crown. See *Regina v. McCormick*, 18 U. C. R. 131.

The rule must be absolute to enter a verdict for the Crown.

MORRISON, J., and WILSON, J., concurred.

Rule absolute.

MEMORANDA.

During this term the following gentlemen were called to the Bar :

DANIEL EDMUND THOMSON, ROBERT PEARSON, HENRY JAMES SCOTT, RICHARD MARTIN MEREDITH, JAMES BOND CLARKE, ALBERT MONKMAN, JAMES LEITCH, CHARLES JOSEPH HOLMAN, JOHN FISHER WOOD, THOMAS COOKE JOHNSTONE, HUGH O'LEARY, EDMUND JOHN REYNOLDS, PHILIP HOLT, MICHAEL KEW, WILLIAM HALL KINGSTON, ALEXANDER HAGGART, WILLIAM MYDDLETON HALL, JOHN PLINY WHITNEY, THEOPHILUS HENRY ALEXIS BEGUE, EDWARD KENRICK, THOMAS STREET PLUMB.

IN THE
COURT OF QUEEN'S BENCH,
AND THE
COURT OF COMMON PLEAS.

Regulæ Generales.

Easter Term, 39 Victoria.

IT IS ORDERED AS FOLLOWS :

1. One of the Judges of one of the Superior Courts of Common Law shall sit in open Court each week in Osgoode Hall, pursuant to "The Administration of Justice Act, 1874," for the hearing and disposing of such matters, and the transaction of such business as may be heard, disposed of, and transacted by a single Judge.

2. There shall be no such sitting at any time between the first day of July and the twenty-first day of August, both days inclusive, or between the twenty-fourth day of December and the sixth day of January thereafter, both days inclusive.

3. The Judge shall sit on Tuesdays and Fridays, at the hour of twelve o'clock noon, or on such other day or days, and at such other hour or hours, as the Judge for the time being shall appoint.

4. It shall be in the power of the Judge, if he see fit, to sit only on one day in each week, if the same be at any time found sufficient for the disposal of business.

5. The Judge may adjourn the sitting of the Court from one day to another, and so from day to day, if found necessary for the disposal of business.

6. The Judge, sitting as aforesaid, shall, either before, during, or after such sitting, as the Judge may appoint, dispose of all such business in Chambers as cannot be disposed of by the Clerk of the Crown and Pleas of the Court of Queen's Bench.

7. All rules for the purpose of the said sittings, shall be four day rules ; and shall, unless otherwise ordered by the Judge, be set down to be heard at the first sitting next after the same is returnable.

8. All demurrers, special cases, appeals from the decision of the Clerk of the Crown and Pleas of the Court of Queen's Bench in Chambers, shall be left with the Clerk of the Court for the time being, on a day not later than two clear days before the day on which the same are to be heard, that is to say, not later than Tuesday for Friday, and not later than Saturday for Tuesday.

9. All rules, demurrers, special cases, appeals, or other matters intended to be argued before the Judge, shall, previous to the sitting of the Judge, on the particular day for the hearing or disposal thereof, be entered by the Clerk of the Court on a list, one copy of which shall be delivered by the Clerk to the Judge, and another posted up outside of the Court room.

10. All rules, demurrers, special cases, appeals, and other matters entered on the said list, shall be called on and disposed of in the order in which the same are entered on the list, unless the Judge otherwise order.

11. The first business at each sitting, shall be motions of course, and motions for rules nisi ; and the next, the cases on the list in the order in which they are entered, unless otherwise ordered by the Judge.

12. Any party desiring the rule order or decision of the Judge to be reviewed and reheard by the full Court in which the cause or matter is pending, shall give notice in writing to that effect, to the opposite party, within two weeks next after the day on which the rule, order, or decision, shall have been granted, made, or pronounced.

13. Unless such notice as last aforesaid be given, the party in default shall, in the discretion of the full Court, be liable to pay

the costs of the review and rehearing to the opposite party, whatever may be the result of the review and rehearing.

14. Except the full Court in the particular case otherwise order, there shall be no review or rehearing allowed by the full Court, unless the same be had within the term of the Court next following the granting, making, or pronouncing of the rule, order, or decision, with which the party is dissatisfied.

15. If the review or rehearing be proceeded with within the period of two weeks next after the day of the granting, making, or pronouncing of the rule, order, or decision with which the party is dissatisfied, no notice in writing, such as required by Rule Twelve, shall be required to be given; but, if given, may be allowed for on taxation.

16. The cause or matter to be reviewed and reheard, shall be set down to be heard on one of the paper days during term, or on such other day, during term, as the full Court may appoint for the purpose, and shall be set down to be reviewed and reheard at least two clear days before the day on which the same is to be argued.

17. The party setting down a cause or matter for review or rehearing, shall deliver to the Clerk of the full Court three copies of the written decision, if any, delivered by the Judge, certified to be correct by the Reporter of the Court; and in the case of a demurrer or special case, shall also deliver to the said Clerk three copies of such demurrer or special case.

18. Notice in writing of the intended review and rehearing, shall forthwith after the cause or matter is set down to be reviewed and reheard, be delivered by the party setting the same down to the opposite party.

19. No petition, rule, or order, shall be necessary for the purpose, of review or rehearing in either of the Superior Courts of Common Law.

20. On a review or rehearing, the party setting down the cause or matter for review or rehearing, shall have the right to begin or reply, unless otherwise ordered by the Court.

21. Nothing in the foregoing rules contained, shall be held or taken, in any manner, to deprive any party of the right to have a cause or matter reviewed or reheard, where the right is conferred by statute, but only to speed the course of proceedings, with a view to such review and rehearing.

22. Nothing in the said rules contained shall be held or taken in any manner to interfere with the power of the Court or the Judge, in their or his discretion for good cause, as regards any particular case, to dispense with all or any of the said rules.

23. The rules of Trinity Term, 38 Victoriæ, promulgated on the 5th September, 1874, shall be rescinded on, from, and after the day these rules shall take effect.

24. These rules shall take effect on the second Monday of the present term of Easter.

Osgoode Hall,
Monday, 15th May, 1876.

Signed,	JOHN H. HAGARTY,
"	ROBT. A. HARRISON,
"	JOS. C. MORRISON,
"	ADAM WILSON,
"	THOMAS GALT.

It is ordered that the Marshal and Clerk of Assizes for the County of York do forthwith, after the close of each Assize, or earlier if required, return to the Clerks of Queen's Bench and Common Pleas, and the Registrar in Chancery, all records in the said Courts respectively, together with all exhibits and other documents appertaining thereto.

May 16, 1876.

Signed,	JOHN H. HAGARTY.
"	ROBT. A. HARRISON.
"	JOS. C. MORRISON.
"	JOHN W. GWYNNE.
"	THOMAS GALT.

Rules of Queen's Bench.

IT IS ORDERED AS FOLLOWS :

1. That the business to be transacted in the Court of Queen's Bench for the Province of Ontario, during Trinity Term next, shall be the same in all respects as business transacted during the other Terms of the said Court, although such business may have arisen prior to or during the present Term of Easter, notwithstanding anything to the contrary contained in section two of Statute 38 Victoriae, Ontario.

2. That the said business shall, during Trinity Term aforesaid, be conducted in like manner in all respects as the ordinary business during the ordinary Terms of the said Court.

3. That eight cases, in the order of their priority on the General List, shall be set down by the Master on the Peremptory List for argument on each of the first four days of the said Term, in the same manner and with the like effect as in other days of the said Term.

4. That the first Friday and the second Monday of the said Term shall be paper days, as provided by the General Rules of Michaelmas Term, 39 Victoriae ; but unless there be at least four cases set down for argument on each of the said days, six cases in the order of their priority on the General List, shall be set down on the Peremptory List for argument on each of the last mentioned days, or one of them, as the case may be, in the same manner and with the like effect as on other days of the said Term.

Easter Term, 39 Victoriae.

Osgoode Hall,

Saturday, 3rd June, 1876.

Signed,	ROBT. A. HARRISON, C. J.
"	JOS. C. MORRISON, J.
"	ADAM WILSON, J.

SITTINGS DURING VACATION

AFTER EASTER TERM.

RE BARBER AND THE CORPORATION OF THE CITY OF
OTTAWA.*Corporation—Debentures—Sinking fund.*

The deposit of the interest and sinking fund required for the payment of debentures of a municipal corporation in a bank at interest, is a temporary investment of such money under sec. 248, sub-sec. 4; of the Municipal Act of 1873; and the corporation has no power by resolution to appropriate interest arising from such investment to any other purpose than the sinking fund.

March 14, 1876, *O'Brien* obtained a rule *nisi* to quash two resolutions or orders made and passed by the corporation of the city of Ottawa, or the council thereof, on the 7th and 21st days of February last, which orders or resolutions were respectively in the words or figures following:—

1. “Moved by Alderman B., seconded by Alderman C., in amendment to the amendment, ‘that the second report of the finance committee be received and adopted, providing the city solicitor gives it as his opinion that it will not be illegal to carry out the recommendation therein contained.’ Carried.” 2. “Moved by Alderman B., seconded by Alderman C., ‘that the communication from the city solicitor regarding the appropriation of interest accruals on interest and sinking fund deposit for the years 1874 and 1875 be received, and that the city treasurer be and is hereby instructed to make up the deficiency, if any, in any of the sinking funds named in the original by-laws of the various city debentures, and expend the remainder in payment of official, police, fire brigade, and labourers’ cheques, in accordance with the terms of the resolution on the subject passed at the last meeting of the council.’ Carried.”

The report of the finance committee referred to in the foregoing resolutions was as follows: “In order to provide for the payment of official salaries, including salaries due the members of the police force and fire brigade, now over two months in arrear, your committee would recommend

that the city chamberlain be instructed to transfer to the local fund all accruals of interest arising during the years 1874-75 from the temporary investment of moneys lying to the credit of the interest and sinking funds accounts of the city debentures, amounting for the years named to the sum of \$10,204.53."

The manner in which this sum had accrued was shewn by the affidavit of one of the members of the council. He stated: "I was last year a member of the finance committee of the council of the corporation of the city of Ottawa, and I am chairman of said committee for the current year. I am well acquainted with the state of the finances of the corporation of the city of Ottawa, and I am aware of the amount of moneys of the said corporation to the credit of the interest and sinking fund required for the payment of the debentures of the said corporation: that the moneys required for said interest and sinking fund have been for some years deposited in the Quebec Bank in the city of Ottawa, under an arrangement that the said bank would allow the corporation the sum of five per cent. per annum on all moneys deposited therein to the credit of the interest and sinking fund accounts. When the first resolution was passed there was, under the said arrangement, due from the bank to the corporation, for interest for the years 1874-75 on the moneys in the bank, to the credit of the said interest and sinking fund, the sum of \$10,204.53 or thereabouts, and both resolutions mentioned in said rule (the one now in question) refer solely to such interest."

The objections were, that it was not competent for the council to appropriate any part of the sinking fund for any debenture, or any interest derived therefrom, or any money derived from any temporary investment of the sinking fund, and that the use of the money in the manner set out in the resolution, was a misappropriation of trust funds, and the resolutions were *ultra vires* of the Corporation.

May 17, 1876, the rule was argued before Galt, J., sitting alone.

Osler, shewed cause. There is nothing in the Municipal Act that would prevent the money in question being applied to purposes other than the sinking fund. The depositing of the money in the bank at interest is not a temporary investment of the fund. He cited *Edinburgh Life Assurance Co. v. Municipality of the Town of St Catharines*, 10 Grant 379.

O'Brien, contra. The fund and the profits arising from it cannot be diverted from the purposes for which the fund was originally set apart. He cited *Harrison's Mun. Man.*, 3rd ed., secs. 248 *et seq.*, and notes.

June 20, 1876. GALT, J.—By sec. 248 of the Municipal Act of 1873, the council may pass by-laws for contracting debts, but no such by-law shall be valid which is not in accordance with the restrictions mentioned in the Act.

By sub-sec. 3 the by-law shall settle an equal special rate per annum, in addition to all other rates, to be levied in each year for paying the debt and interest.

By sub-sec. 4 such special rate shall be sufficient to discharge the debt and interest when payable. Sub-sec. 5, the amount of ratable property shall be ascertained irrespective of any future increase of the ratable property, &c.; “and also irrespective of any income from the temporary investment of the sinking fund or of any part thereof.”

I may observe that Mr. *Osler* strenuously contended that the depositing of moneys in a bank at interest is not a temporary investment. I cannot agree with him. It appears to me to be the only temporary investment they could, of their own accord, make, for by sec. 268, if any part of the produce of the special rate cannot be immediately used towards paying the debt by reason of no part thereof being yet payable, the council shall from time to time invest in Government securities or otherwise, as the *Governor in Council may direct*.

By sec. 254: After a debt has been contracted the council shall not, until the debt and interest have been paid, repeal the by-law under which the debt was contracted *

* and shall not apply to any other purpose any money of.

the corporation which, not having been previously otherwise appropriated by any by-law or resolution, has been directed to be applied to such payment.

The council, from the papers submitted to me in this application, appear to have acted as if they were empowered to do what they have done under secs. 260, 262.

This is conclusive against them. The alterations therein sanctioned must be made by by-law, and such by-laws must be approved by the Governor in council: See sec. 261, and sec. 263, sub-sec. 6. This rule will therefore be made absolute, with costs.

Rule absolute.

COULTHARD V. ROYAL INSURANCE COMPANY.

Insurance—Pleading—Departure—Account of loss.

The declaration, after setting out a condition of the policy, that the assured sustaining loss should within fourteen days deliver in a particular account thereof, &c, averred the performance of all conditions precedent.

Defendants pleaded that the plaintiff did not within fourteen days after the loss deliver in the account. And in another plea, that he did not, although reasonably required, make proof by his declaration and books of account, &c.

The plaintiff replied to the first plea, that the policy was not delivered to him until long after the fire, and that within fourteen days after receiving it he delivered the account; and to both pleas, that he delivered an account, and that defendants afterwards made further requisitions, which were complied with, and defendants never notified him in writing that the proof was objected to because not given in time.

Held, on demurrer, replication bad, as being a departure from the declaration.

DEMURRER. The declaration, on a policy of insurance, after setting out, among other things, that it was a condition endorsed on the policy, that the assured sustaining any loss or damage by fire were immediately to give notice to the company, and within fourteen days to deliver in as particular an account of their loss or damage as the nature of the case would admit of, concluded by an averment of performance of all conditions precedent.

Plea, 3. That the assured did not within fourteen days after the alleged loss deliver in as particular an account of

the alleged loss as the nature of the case admitted of, according to the said condition in that behalf, endorsed on the said policy. 4. That the assured did not, although he was, after the alleged loss, reasonably required by the defendants so to do, make proof by his declaration or affirmation, and by his books of account and other proper vouchers, of the alleged loss and damage, according to the said condition.

To the third plea the plaintiff replied, 3, that the policy was not delivered to him, to enable him to see what the conditions endorsed thereon were, until long after the fire occurred, and that he did within fourteen days after he received the said policy make out and deliver to the defendants as particular an account as the nature of the case would admit of.

The plaintiff also replied to both pleas, 4, that he delivered to the defendants after the fire, as particular an account of the loss as the case would admit of, &c., and that the defendants afterwards, through their agent, made further requisitions thereon, all of which requisitions were fully complied with, and the defendants did not, either then or at any time before the commencement of this suit, notify the plaintiff in writing that the statement or proof was objected to because it was not given within fourteen days.

These replications were demurred to, on the ground among others, that they were a departure from the declaration.

May 23, 1876. *Beaty*, Q. C., for defendants. The replications are a departure. *Jacobs v. Equitable Ins. Co.*, 17 U. C. R. 35, does not come within the 38 Vic. ch. 65, O. As to the fourth replication, see *Fawcett v. The Liverpool, London, and Globe Ins. Co.*, 27 U. C. R. 225; *Smith v. Queen Ins. Co.*, 1 Hannay N. B. 311; *Toms v. Wilson*, 4 B. & S. 442.

M. C. Cameron, Q. C., contra. It is inequitable to allow the condition. We had not the policy until after the fire, and so could not comply with its terms as to fourteen days;

but we did comply in fourteen days after we got the policy. The other replication shews a clear waiver of the condition. He cited *Canada Landed Credit Co. v. Canada Landed Agricultural Co.*, 17 Grant 418; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69.

June 28, 1876. GALT, J.—There can be no question that the replications are departures from the declaration. The latter, after setting out the condition respecting the fourteen days, avers a compliance with its terms, and when this is denied, the third replication admits that the condition had not been complied with, but sets up as an excuse that the plaintiff was not in possession of the policy, and was not aware that it contained such a condition.

The fourth replication also admits that he did not furnish the proof within fourteen days, but sets up that, although the defendants made a requisition for further proof, they did not in such requisition object that the proof was not furnished within the fourteen days.

It appears to me that these replications cannot be supported, and the declaration must be amended, as the plaintiff may be advised, so as to raise the question as to the right of defendants to raise such a defence, and also so as to bring up the question relied on by Mr. Cameron, as to the operation of the first section of 38 Vic. ch. 65, O. It is unnecessary to consider the question raised by the demurrer to the rejoinder, as I am of opinion that the replications are bad for the causes assigned.

Judgment for defendants.

JOHN G. GRANT, JUDGMENT CREDITOR, ALEXANDER
MCDONEILL, JUDGMENT DEBTOR, MARTIN MOORE,
GARNISHEE.

Attachment of debts—Order to pay—Assignment of debt.

Orders upon a garnishee to attach and to pay over were set aside, on its being shewn that the debt in question had been assigned by the garnishee before the judgment creditor had obtained his judgment; but no costs were given, as the assignees had neglected to give notice of the assignment to the garnishee.

April 21, 1876, *Osler* obtained from Harrison, C. J., sitting alone, a rule calling upon the plaintiff and the garnishee to shew cause why the order made herein by Mr. Dalton in Chambers on the 31st March, 1876, to attach debts due by the garnishee to the judgment debtor, so far as the same related to the debt hereinafter mentioned, the order made thereon herein by the junior Judge of the county of Simcoe on the 6th day of April, 1876, under and in pursuance of the said order, directing and ordering the said garnishee to pay to the judgment creditor the debt or sum of \$182 therein stated to be due from him to the said judgment debtor, and all subsequent proceedings on the said last mentioned order, should not be set aside or rescinded, on the ground that the debt or claim by the said order attached and ordered to be paid over had been assigned and transferred by the said judgment debtor before the said attaching order was made; or why the said order should not be rescinded so far as relates to the sum of \$130, part of the debt attached, on the ground that the said sum is the amount of the costs taxed in the suit of *McDonell v. Moore*, mentioned in said affidavit filed, and that Messrs. William Lount and George W. Lount as attorneys for the said judgment debtor had a lien thereon, and were entitled to the same as and being their costs in the said suit, &c.

From the affidavits and papers filed, it appeared that the Messrs. Lount, on whose behalf this application was made, were employed as solicitors for the judgment debtor in a suit against the garnishee, and had recovered a verdict of

fifty dollars and costs. On the 14th December, 1875, before judgment had been entered upon this verdict, the said judgment debtor executed an assignment of the said verdict, and also all costs to be derived thereunder, and also the judgment to be entered thereon and all benefit to arise therefrom either at law or in equity, to the said Messrs. Lount. This was expressed to be made for the consideration of the sum of one hundred dollars, which was not the full consideration, but as the *bona fides* of the assignment was not impugned it is unnecessary to refer to this point. Judgment was entered up on this verdict on 28th March, 1876, and execution placed in the hands of the sheriff on the same day. In the meantime the plaintiff had, on the 15th February, 1876, recovered a judgment against the defendant the assignor. The garnishee proceedings were then taken, as already stated, on the 31st March and 6th April. No notice of the assignment had been given by the assignees to the garnishee.

May 19, 1876.—The rule was argued before Galt, J., sitting alone. *J. B. Read*, for the plaintiff. In consequence of no notice having been given of the assignment to the garnishee before the order was made on him to pay over to the plaintiff the assignees had lost their priority: *Watts v. Porter*, 3 E. & B. 743. The assignees simply as attorneys had no general lien on the judgment recovered by them for professional services: *Bank of Upper Canada v. Wallace*, 2 P. R. 352; *Ward v. Vance*, 3 P. R. 130.

Osler, contra. No notice was required. The debt was actually assigned before the garnishee proceedings were instituted. The attorneys, on the affidavits, are plainly shewn to have had a lien. He cited *Farquharson v. City of Toronto*, 12 Grant 186; *Wood v. Dunn*, L. R. 2 Q. B. 73; *Hirsch v. Coates*, 18 C. B. 757; *Davidson v. Douglas*, 12 Grant 181; *Rittinger v. McDougall*, 10 C. P. 395; *Ferguson v. Carman*, 26 U. C. R. 26; *Pickering v. Ilfracombe R. W. Co.*, L. R. 3 C. P. 235.

June 28, 1876, GALT, J.—As I understand the present case, the attorneys do not claim as attorneys beyond the

amount of costs taxed in the suit of *Macdonell v. Moore*, but they claim under the assignment of the verdict and judgment to be entered thereon, which assignment was made before the plaintiff had obtained his judgment against the defendant.

If I am correct in this view, then, as the assignment is not impeached the case of *Bank of Upper Canada v. Wallace*, 2 P. R. 352, is a direct authority in favour of the assignees. That case was decided in 1859, but in 1866 the effect of an assignment on garnishee proceedings was before the Queen's Bench in the case of *Ferguson v. Carman*, 26 U. C. R. 26 cited by Mr. Osler, and it was expressly held that an assignment of a debt will prevent the garnishment.

Draper, C. J., in giving judgment says, p. 31: "If so, it only remains to enquire, whether the assignee's claim would, if made known to the Judge in Chambers, have prevented the order being made, and whether the garnishees withheld the fact from the Judge." (We have nothing to do in the present case with the second enquiry.) "We are of opinion against the garnishees on both points. As to the first, *Hirsch v. Coates*, 18 C. B. 757, is a direct authority. See also *Wood v. Dun*, L. R. 2 Q. B. 73. An analogy might be deduced leading to an opposite conclusion from the case of *Watts v. Porter*, 3 E. & B. 743, (the case relied on by Mr. Read) in which Erle, J., differed from the rest of the Court. The opinion of the learned Judge is however sustained by V. C. Sir W. P. Wood in *Scott v. Lord Hastings*, 4 K. & J. 633, and it is in accord with the opinion expressed in *Kinderley v. Jervis*, 22 Beav. 1, and in *Beavan v. Lord Oxford*, 6 DeG. McN. & G. 492."

This is a direct authority in favour of the applicant, and consequently this rule will be made absolute to set aside the proceedings, but without costs, as the difficulty appears to have been occasioned by the assignees neglecting to give notice of the assignment to the garnishee.

Rule absolute.

KAVANAGH V. THE CORPORATION OF THE CITY OF
KINGSTON.

Deed and mortgage book—Action on covenants in the deed—A. J. Act, 1873, s. 2.

The plaintiff sued defendants on their covenant for title in a conveyance of land to the plaintiff, alleging as the breach, that at the time of the execution of the deed, one H. was possessed of part of the land under a demise from defendants, on which part was a stone wall, whereby the plaintiff was unable to build on said wall, and his premises were injured. The defendants pleaded that the plaintiff had reconveyed the land to them by way of mortgage, with the usual covenants for title, which was still in force and unpaid. The plaintiff replied, on equitable grounds, that the mortgage provided for possession by him until default, and that no default had been made.

Held, on demurrer, that the action could not be maintained, nor transferred to the Court of Chancery, under sec. 2 of the Administration of Justice Act of 1873, not being for a purely money demand.

DEMURRER. Declaration. First count: that on the 5th of October, 1875, the defendants, by a deed in the statutory form, conveyed certain lands to plaintiff for \$4,500 paid by him to them, and therein defendants covenanted for title and quiet enjoyment.

Breach: that the defendants had not the right to convey the said lands unto the plaintiff, according to the true intent of the indenture, notwithstanding any act of the defendants, because before and at the time of the making of the said indenture one Isaac Hope was possessed of a part of the said lands, namely, a strip thereof along the north-west side, twenty feet in length by one foot in width, as tenant thereof to the defendants, and demised to him by the defendants for a term which has not yet expired, on which strip was and is built the stone wall of a shed whereby the plaintiff was unable to build on the said wall, and the said premises of the plaintiff were thereby greatly injured by rain water, snow and ice flowing, falling, and forming into, upon, and against the said premises of the plaintiff, from and off the roofs of buildings on the next adjoining land of the defendants.

There were two other counts of a like nature, shewing

injury to the premises in the first count mentioned, by rain dripping from adjoining buildings, &c.

Eighth plea, to the three counts: that after the making of the said alleged indenture, and on the day of the date of the same, and before the alleged breaches in the said count mentioned, the plaintiff by deed granted and conveyed all his estate, right, title, property, and interest in the lands to the defendants, who were by law authorized to take such conveyance thereof, to secure a certain sum of money, therein mentioned, which still remains unpaid, and the said last mentioned deed is still operative and in force, and contains the usual covenants for title, similar to those in the first said count alleged to be contained in the said indenture in the said first count mentioned; and the said lands were, from and after the making of the said deed by the plaintiff, and at the time of the commencement of this suit, vested under the last mentioned deed in the defendants, and the plaintiff had not at the commencement of this suit got back or become seized of his former estate, right, or interest in the said lands in the said counts mentioned, or any part thereof, or of any estate therein entitling him to bring this action, whereby the causes of action in the said three counts mentioned could not and did not accrue to the plaintiff at the commencement of this suit.

Replication, on equitable grounds, to the eighth plea: that the said deed was made by way of mortgage only, in pursuance of the Act respecting short forms of mortgages, and provided that until default of payment the plaintiff should have quiet possession of the said lands; and that no such default has been made.

Demurrer to the replication, on the ground that, notwithstanding the matters stated in the said replication, the plaintiff has no right to sue the defendants while the mortgage to them exists unsatisfied, because the legal title to the lands so mortgaged is out of the plaintiff and is vested in the defendants, the mortgagees, and carries with it all covenants as to title or running with the land and cognate rights to sue to the defendants, and it is

indifferent whether the deed was by way of mortgage or not.
Joinder.

May 23, 1876, *Delamere* was called on to support the replication. Before the Administration of Justice Act the action would not lie; now there is the same remedy at law and in equity: *Rawle* on Covenants, 4th ed., 342, 343, 346; *Dart V. & P.*, 4th ed., 777; *Soules v. Soules*, 35 U. C. R. 334. If this Court cannot entertain the case it should be transferred to the Court of Chancery.

MacLennan, Q. C., contra. The covenant runs with the land, and only the holder of the legal title can sue: *Burrows v. DeBlaquiere*, 34 U. C. R. 498. The action is premature till the mortgage is paid off. There is no remedy now at law or in equity.

June 28, 1876. GALT, J.—Mr. Delamere admitted that at law this action cannot be sustained, but he argued that under the provisions of the 2nd section of the Administration of Justice Act of 1873, it might be entertained. That section is, “Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff’s right to recover may be an equitable one only, and no plea, demurrer or other objection on the ground that the plaintiff’s proper remedy is in the Court of Chancery, shall be allowed in such action; but the Court shall have the discretionary power hereinafter mentioned to transfer equity matters to the Court of Chancery.”

This is an action brought by the plaintiff as purchaser of a piece of land from the defendants, on the covenants for title contained in the deed, the plaintiff having executed a re-conveyance to the defendants by way of mortgage, which mortgage is outstanding and unpaid. The breach of covenant complained of is, that before the execution of the deed to the plaintiff, “one Isaac Hope was possessed of part of the said land, viz., a strip thereof along the north-west side thereof, twenty feet in length by one foot in width, as tenant thereof to the defendants, and de-

mised to him by the defendants for a term which had not yet expired, on which strip was and is built the stone wall of a shed, whereby the plaintiff was unable to build on the said wall, and the said premises of the plaintiff were thereby greatly injured by rain water," &c.

This statement of the injury complained of is certainly not "a purely money demand" enforceable only in equity; it is a claim for damages for an injury to the plaintiff's premises, arising, as is alleged, from a breach of covenant for title on the part of the defendants. It is not, therefore, a case coming within the provisions of the first section. If this is so, then I have no power to entertain the case, nor to transfer it under that section to the Court of Chancery, for it is only in cases of a purely money demand that such power is given.

I have examined the authorities referred to by Mr. Delamere, and I cannot find anything in them which will sustain this action. It might be that after the plaintiff had recovered damages in this case, supposing the action could be sustained, he might make default in payment of his mortgage after having received a considerable sum of money as damages done to a property of which he was not the owner.

Judgment for defendants.

TRINITY TERM, 40 VICTORIA, 1876.

August 28th to September 9th.

Present :

THE HON. ROBERT ALEXANDER HARRISON, C.J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

HAZZARD V. THE CANADA AGRICULTURAL INSURANCE
COMPANY.

Insurance—Assignment of policy—Mortgage—38 Vic. ch. 65 sec. 1.

The plaintiff, on the 10th of September, 1874, insured with the defendants on a barn and stable, \$100; on the produce, farming implements, &c., from time to time stored therein, \$400; and on horses and live stock, \$300. The policy was assigned by the plaintiff absolutely on the 27th January, 1875, with the defendants' consent, to the Loan and Agency Company, who had a mortgage on the land on which the barn and stable stood for \$400, but no claim to the chattels, and the actual nature of their interest in the policy was not mentioned in the assignment, nor notified to the defendants until after the fire, which took place on the 12th of July, 1875. A correspondence, set out in the case, took place between the defendants and the company, as a result of which the defendants paid to the company the \$100 insured on the buildings.

The declaration alleged that the plaintiff was interested in the properties to the amount insured at the time of making the policy, and until and at the time of the loss: that having mortgaged the land on which the said properties were situate to the Loan and Agency Company, to secure certain money advanced, he, with the defendants' consent, assigned to said company all his interest in the policy: that the property insured was burned, whereby said company became entitled to recover the amount of said loss: that all things happened to entitle them to sue therefor: that defendants paid to them the \$100 insured on the building, but no more; and that afterwards the company assigned to the plaintiff the policy and all causes of action thereon. Defendants pleaded, that the said Loan and Agency Company were not at the time of the loss interested in the chattel property as owners or otherwise.

Held, that the plaintiff could not recover, for the Loan and Agency Company had not at the time of the loss any interest in the

goods; and that there was nothing in the correspondence above mentioned, or in the dealings between the different parties, stated in the case, which made it inequitable in defendants to set up this defence, so as to entitle the plaintiff to relief under the 38 Vic. ch. 65, sec. 1, O. Defendants also pleaded that the encumbrance to the Loan and Agency Company was created by the plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent, who took the plaintiff's application for insurance, also obtained the loan for him: that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing; and that after the fire defendants were told by the company that they had a claim only to the \$100 insured on the buildings, which they sent to them by letter. *Held*, that defendants sending the money by letter was a written consent to the encumbrance; and that their assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment.

Defendants also pleaded false swearing by plaintiff in his affidavit of loss in stating that he had effected no additional insurance. *Held*, that the sworn claim of the plaintiff for loss made upon a policy with another company was admissible, without producing the policy; but that upon the evidence, set out in the case, it did not sufficiently appear that the same property was insured by both companies.

Quere, whether an affidavit as to other insurances is an affidavit in relation to the loss or damage.

ACTION on a fire policy, dated 10th September, 1874, for \$800, for three years, distributed as follows:—

On a barn and stable,	\$100 00
On produce, from time to time stored in the same,	300 00
On farming implements, waggons, and harness, from time to time stored in the said barn and stable,	100 00
On horses,	200 00
On live stock,	100 00

The declaration alleged that the plaintiff, at the making of the policy, and thence until and at the time of the loss, was interested in the several properties to the amount so insured thereon respectively: that the plaintiff having mortgaged the land on which the said properties were situated to the London and Canadian Loan and Agency Company, to secure certain money advanced by the said Loan and Agency Company to the plaintiff, he, the plaintiff, with the consent and approval of the defendants on the said policy endorsed, for good and sufficient consideration, assigned and set over unto the said Loan and Agency

Company, and their assigns, all the right, title, and interest in the said policy, and all advantages to be derived therefrom; and that after the said assignment, and while it was in full force, the said barn and stable, and a large quantity of produce stored therein, and a large quantity of farming implements, waggons, and harness stored therein, were burnt, damaged, and destroyed by fire, whereby the said Loan and Agency Company became entitled to demand and receive from the defendants, by virtue of the policy and assignment, the amount of the said loss and damage on the barn and stable, and the said produce, farming implements, waggons, and harness, to the several amounts so insured thereon respectively * * And all things happened, and all times elapsed necessary to entitle the said Loan and Agency Company to maintain an action for the recovery of the said loss and damage. That the defendants paid to the said Loan and Agency Company the sum of \$100 in full satisfaction of the loss and damage on the barn and stable, but did not pay the loss and damage on the said produce and farming implements, or any part thereof; and that after the accruing of the said cause of action, and before the commencement of this action, the said Loan and Agency Company did assign, transfer, and set over to the plaintiff the said policy of insurance, and all causes of action and suit, claims, and demands then existing, or thereafter to arise in respect of said policy, and the loss and damage occasioned to the said property. And all conditions were fulfilled, &c., yet the defendants have not paid, &c.

Fourth plea: that the said Loan and Agency Company were not, at the time of the loss, interested in the said produce, farming implements, waggons, and harness, or any of them, as owners or otherwise.

Ninth plea: that the claim had been forfeited by false swearing in the plaintiff's affidavit, in relation to his loss or damage.

Eleventh plea: that after the making of the policy, the plaintiff created an encumbrance on the barn and stable

by the mortgage to the said Loan and Agency Company, without obtaining the written consent of the defendants thereto, as required by the conditions of the policy.

Issue.

The cause was tried at the last Spring Assizes at Owen Sound, before Patterson, J.

The policy was assigned by the plaintiff to the Loan and Agency Company on the 27th of January, 1875.

The fire was on the 12th of July then next.

A great deal of evidence was given to shew that the plaintiff had made out a false statement of his loss by putting articles into it which were not his, and some which were not lost, and by over-valuing them; and also to repel such a charge, and an affidavit made by the plaintiff for loss under another policy alleged by defendants to be on the same property, in the Beaver Co., was tendered and rejected because the Beaver policy was not produced, and by which affidavit it was intended to shew that the plaintiff had claimed payment from the Beaver Co., for loss on the same goods on which he claimed in this action.

The affidavit of loss put in as to the policy now sued on stated that "I have not effected any additional insurance except by consent of the company."

The learned Judge charged the jury that the plaintiff was entitled to recover the value of the goods which were covered by the policy, and were destroyed by fire, unless he had been guilty of fraudulently swearing what was false in his claim of loss: that the proof of the affidavit and claim made in the matter of the Beaver Company was not sufficient evidence of fraud in this cause, because no policy in the Beaver Company was shewn—except by the plaintiff's own evidence that he had a policy in that company, but not on the same property which was insured with the defendants—and by this affidavit and claim itself, which in the charge of falsely swearing that he had no other insurance on the goods in question, was not sufficiently precise to shew fraud; and that the document shewing that there was once an insurance of some kind, which had been

avoided by effecting a subsequent insurance without notice was not sufficient evidence, on a plea, of fraud that the plaintiff claimed from the Beaver Company the amount mentioned in the schedule. And that was this not assisted by the evidence of payment by the Beaver Company, which evidence only was, that that company paid, and the plaintiff accepted in full of his claim of \$106, the sum of \$50, and there was nothing to shew of what the items which were covered by the \$50 consisted, whether of the items which the defendants' policy covered or not.

The verdict was entered for the defendants on the issue on the fourth plea, and for the plaintiff on the other issues, and the damages were assessed at \$100.

In Easter term last, May 17, 1876, *Masson* obtained a rule calling on the defendants to shew cause why the verdict on the issue on the fourth plea entered for them should not be set aside, and a verdict entered thereon for the plaintiff, on the ground that such verdict was contrary to law and evidence, and the weight of evidence; or why judgment *non obstante veredicto* should not be entered for the plaintiff on the said issue, on the ground of the substantial insufficiency of the fourth plea.

J. W. Kerr, for the defendants, at the same time obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or a verdict entered for the defendants on the issues upon the ninth and eleventh pleas, on the ground that the verdict thereon was contrary to law and evidence, and in pursuance of the Law Reform Act and the Administration of Justice Act; and for misdirection in the learned Judge who tried the cause, in ruling that there was evidence of fraud or false swearing to sustain the ninth plea, and that there was evidence to sustain the verdict on the eleventh plea; or why the damages should not be reduced to one shilling.

In this term, August 30, 1876, *G. Kerr, Jr.*, shewed cause to the defendants' rule and supported the plaintiff's

rule. It is said that the assignment by the plaintiff to the Loan and Agency Company of his entire interest in the policy, and that company being the holders of it at the time of the loss by fire, prevented the plaintiff from claiming as the owner of the chattel property which was insured by that policy, or as interested in it. The plaintiff, it was said, was prevented from claiming because he was not the owner of the policy; and the Loan and Agency Company could not claim, because they were not interested in the goods. Looking at the whole facts and circumstances, it appears that the plaintiff had an interest in the policy at the time of the loss by fire. He had made a mortgage of or upon his land on which the barn and stable, which were insured by the defendants' policy, stood, and to secure the money lent on the mortgage he assigned his whole interest in the policy covering the chattels, as well as the barn and stable. The plaintiff still remained interested in the policy. He was entitled to it again on paying the mortgage money. The Loan and Agency Company were trustees for the plaintiff for the insurance money over and above the \$100 which was secured expressly upon the barn and stable, and instead of reassigning the policy to him, they could have sued for the claim now made by the plaintiff in their own name.

Bethune, Q. C., contra. The assignment to the Loan and Agency Company was absolute in form. Every assignment creates a new contract: *Pratt v. The New York Central Ins. Co.*, 64 Barb. 589; *Wilson v. Hill*, 3 Metc. 66, 69. The defendants did not know of the extent of the Loan and Agency Company's interest in the policy. They must have supposed they had the whole interest in it. It afterwards appeared they had an interest in the property covered by it only to the extent of \$100, which was insured upon that property, and that they never had an interest in any of the chattel property which was specially insured to the amount of \$700. The Loan and Agency Company could not be, and were not, trustees for the plaintiff for the insurance money upon the chattel property, because there was no declaration of trust to that effect, and no such trust is to be implied: *Crowley v. The Agricultural*

Mutual Assurance Association of Canada, 21 C. P. 567. As to the ninth plea, the defendants are entitled to a verdict upon it. That plea charges false and fraudulent swearing by the plaintiff in his claim relating to his loss. His affidavit does expressly state that he had not effected any additional insurance upon it, except by consent of the defendants. There was no such consent, and there was the additional insurance in the Beaver Company. That fact appears by the affidavit which the plaintiff made by reason of this same fire, when he made his claim upon the Beaver Company. He stated in his affidavit sent in to that company "that there was other insurance on the said property, \$800, in the Canada Agricultural Insurance Co." That affidavit also shews that the plaintiff had insured with the Beaver Company before insuring with the defendants, and that when he made the latter insurance he "did not give notice to the Beaver and Toronto Insurance Company, as required by the conditions of their policy." His affidavit before referred to shews that he insured with the Beaver Company "on the contents of the barn, \$200." So that it is clear by that affidavit the property the plaintiff is now claiming compensation for was insured at the time of the loss by fire with the Beaver Company, as well as by the defendants. But the learned Judge at the trial ruled that the affidavit was not admissible, because the Beaver Company's policy, to which it related, was not produced, and it therefore did not appear by that policy the property insured by it was the same to which the defendants' policy applied. It was not necessary the policy should have been produced. The affidavit referred to was sufficient for the purpose. As to the eleventh plea, there was no consent in writing to the plaintiff making the mortgage. The consent was given by the company to the plaintiff assigning the policy, but not to his encumbering the property.

September 26, 1876. WILSON, J.—The question as to the eleventh plea may be disposed of at once, on the following facts.

The money secured by mortgage was raised from the Loan and Agency Company by Mr. Fleming, the agent of the defendants, who took the plaintiff's application for the policy.

The plaintiff assigned the policy to that company as further security, with the mortgage for the loan, and Mr. Fleming, the agent, witnessed it. He then sent the policy, with the assignment upon it, to the defendants' branch at Cobourg, at which Mr. Fish is the manager, for the defendants' approval, and Mr. Fish, the general agent of the defendants, assented under his hand to the policy being assigned to the Loan and Agency Company. The defendants must therefore have known that the plaintiff had either absolutely or conditionally parted with the property insured, or with some part of it, to the Loan and Agency Company, otherwise the assignment to them would have been wholly inoperative.

When Mr. Flynn, the defendants' adjuster, saw the plaintiff and Mr. Fleming after the fire, he was reminded by Mr. Fleming that the Loan and Agency Company had the claim under the policy, and that he could not settle finally with the plaintiff. After that a correspondence took place between the defendants and the Loan and Agency Company, respecting the company's claim under their assignment of the policy, in which the company repeatedly told the defendants they had a claim only on the \$100 insured upon the buildings, and that they were trustees for the plaintiff for the residue of the policy; and the defendants accordingly, after about a month's negotiations, paid to the company the \$100 which applied to the buildings. It is too late now for the defendants to say they did not assent to the encumbrance. They did in fact assent to the transfer of the policy, and that raises I should say an irresistible inference that they did know some change of the property had been made by sale, mortgage, or otherwise, which would be necessary to give validity to the transfer of the policy—to the extent at any rate of the interest of the party getting the assignment in the property in question.

The learned Judge was of opinion that the sending of the money to the Loan and Agency Company by letter was a written consent to the making of the encumbrance. I say so too. The payment to the Loan and Agency Company of the \$100 puts that also out of the question.

But I go further back, and hold that the assent to the assignment of the policy may be used in evidence as a sufficient consent to some transfer of the property being made, or of its having been made so as to make the assignment of the policy operative and beneficial to the assignee of it.

As to the disposal of the issue on the ninth plea, I am of opinion the sworn claim of the plaintiff for loss made on the Beaver Company was admissible in evidence, without producing the policy issued by that company, upon the ground that it was a statement made by the plaintiff respecting a matter in which he had an interest, and adverse to that interest. But granting it to have been admissible, was the barn mentioned in that statement the same barn upon which the defendants had a policy?

The plaintiff said his house and another little building were insured in another company—"I had an old barn which I made a milk house, and that was insured in the Beaver. * * I did not claim anything from them that was claimed from this Company." He also spoke of his *other* barn.

Fleming, the agent said: "The Beaver policy covered nothing on the building I insured, as I expressly understood;" and he said, "The small house was close to the barn; I did not think it was anything more than a pig-house."

Mr. Squier, the inspector of the Beaver Company, said: "I asked him what articles had been in the new building and the old, insured with defendants, and that if he would shew me what was in the buildings insured with us and not with defendants, I would consider if we were liable for them."

There were therefore two buildings of some kind, which the plaintiff called his new and old barn. It may be that

one was like a pig-house. But the question whether it was a barn or a pig-house, and, if a barn, the fact of which barn was insured by the defendants, might have been left to the jury. All that can now be said on the evidence is, that it may be quite right what the plaintiff says, that he insured the new barn with the defendants, and that he claimed nothing from them which was insured with the Beaver Company; and there having been two barns, it may be quite true that the Beaver policy was on the one barn, while the defendants' policy was on the other barn, and so nothing is established by the use of the affidavit of loss sent to the Beaver Company, that there was an insurance on contents of barn.

From such an expression, I should infer that in 1871, when the Beaver policy was procured, there was only one barn, and in 1874, when the defendants' policy was made, there was probably a new barn built. The plaintiff said he had an old barn, which he "made a milk house, and that was insured in the Beaver." The plaintiff's son spoke of the *cow stable*.

If the old barn was a milk house, as the plaintiff said it was, or a cow house, and not a barn at all, it may be that the Beaver Company should not have paid the plaintiff, if he changed the old barn he had insured with them into a milk house or cow stable, but that would not prevent the plaintiff from recovering from the defendants in respect of the goods in the new barn, because the new barn was, as I understand, put up after the Beaver policy attached, and so was not covered by their policy.

The fact that the plaintiff, in his affidavit before referred to, has represented that the defendants' policy is upon the same property as that which is insured by the Beaver, cannot be literally correct, for the Beaver policy is on the dwelling house and contents, as well as on the contents of the barn, and the defendants' policy does not apply to the house or its contents.

I infer from the evidence that the barn referred to in the Beaver policy is not the one referred to in the defen-

dants' policy, and that the new barn was built since the Beaver insurance was made; and that the old barn having ceased to be a barn at the time of the loss, the articles paid for by the Beaver Company being in the new barn, the Beaver Company was not liable to pay for them because they were destroyed in a building different from the one they were in when the insurance was made. But a wrong done to that company will not affect the defendants, and, therefore, I think the verdict upon that issue upon the evidence there is, cannot be said to be wrong. It may be that the ninth plea does not apply to an affidavit made as to other insurances, inasmuch as that may be said not to relate to the loss or damage.

There remains then the issue on the fourth plea to be considered—whether it can be said the Loan and Agency Company were interested in the chattels insured, as owners or otherwise, at the time of the loss?

They had a mortgage over the real property of the plaintiff, upon which the barn and stable insured by the defendants stood. Their loan to the plaintiff was \$400. The insurance on the barn and stable was \$100, but the insurance on the chattel property contained in it was \$700. The Loan and Agency Company got an absolute assignment of all the plaintiff's right and title on the policy, and all advantages to be derived therefrom. Their mortgage on the realty being for \$400, it was desirable for them to have an assignment of as large a portion of the insurance money beyond the \$100 which was upon the realty as they could obtain. There was an object therefore in the assignment being made to them of all the plaintiff's interest in the policy.

The subjects of the policy are divisible. The Loan and Agency Company had nothing to with the chattel property, nor with the insurance on it. The general assignment was probably made from want of knowledge, or from inadvertence on the part of those who were concerned in it. The Loan and Agency Company never had a right to it, and never claimed any interest in it, but as trustees for the

plaintiff. Still, if they got such portion of the money as trustee for him, they might have retained the residue of their claim against him out of it. They were not at the time of the loss interested in the goods.

The case is really this: the plaintiff had, although the assignment of the policy was absolute in form, the right or equity of redemption of the policy. The actual nature of the Loan Association's interest in the policy was not mentioned in the assignment, nor, so far as we see, notified to the defendants before the fire. If it had been, there would have been no difficulty about it. The plaintiff, I think, has no answer at law, independently of the late insurance statute, to the fourth plea.

The first time the defendants became aware of the plaintiff's actual interest remaining all the time in the goods, and that the Loan Association claimed only the insurance on the building, appears to be contained in the defendants' letter of the 16th of August, 1875, addressed to the Loan Association, in which they enclose a draft of \$100, "in full for amount on buildings under said policy," and in which they asked the Loan Association to sign a receipt in full of the policy.

The Loan Association, by their letter of the 19th of August, refused to give such a receipt without Hazzard's consent, but said they would write to Hazzard about it.

On the 30th of August the Loan Association wrote to the defendants, saying they had informed Hazzard that they had notified the defendants that they, the Loan Association, had got the first item in the policy, the \$100, against their mortgage; but as to the second item, that they had informed the defendants they were merely trustees for Hazzard, and that they, the Loan Association, had to obtain the plaintiff's consent. The letter of the association proceeded:—"I added that you had sent me a sixty days' draft for \$100 'in full for amount on buildings under the policy,' but that you had further sent me, as a condition of the draft, a receipt to sign in full of all claims and demands under the policy. I added, 'As the whole insu-

rance was assigned to us, I cannot sign such a receipt, nor can I part with the policy unless with your consent. If you have really settled your claim with the company, you will of course give that consent. Please reply at once, returning the within receipt, with your instructions.' To-day I have a letter from Hazzard, and one from his solicitors, authorizing me to give a receipt for \$100 in full of the insurance on the building, and indicating that he is not satisfied with your proposed settlement of the chattel claim."

The correspondence continued to the 18th of September. It is stated in it by the Loan Association, that some agent of the defendants had represented, as the manager of the Loan Association understood, that the defendants were resisting Hazzard's claim because of his alleged fraudulent over-valuation of goods destroyed.

Can the plaintiff properly reply, under the 38 Vic. ch. 65, sec. 1, O., that there is any reason, from the facts herein mentioned, that it would be inequitable that the insurance should be deemed void merely because he did not notify the defendants that the interest of the Loan Association was not an absolute one, but conditional only as security for the payment of the mortgage, and that it was not for the whole sum of \$900 insured, but was upon the building only, and for \$100; but that the defendants knew of all these facts soon after the loss by fire, and never objected to the claim made by the plaintiff under the policy for that cause; and can he shew the Court or a Judge that such a replication would be a sufficient answer to the plea?

After the fire, the defendants' adjuster, forgetting the policy had been assigned, endeavoured to settle with the plaintiff for \$75 in full. The plaintiff says, as I understand, he thought the defendants were also to pay the Loan Association \$100 on the building. That settlement, such as it was, fell through, because the adjuster had it called to his mind that the plaintiff had assigned the policy to the Loan Association, and he was not the person to receive the money. The defendants afterwards proposed to pay the

\$100 to the Loan Association on the building, and to hold the plaintiff to the receipt he had given. They never admitted his claim to anything. I cannot say the Loan Association never intended to claim anything beyond the \$100 upon the building. They had the legal right, so far as the plaintiff was concerned, to do so; but they were prevented from doing it because they were not interested in the chattel property.

I do not see anything inequitable in the defendants saying to the plaintiff that he had no claim on them, because he had no interest whatever in the policy, having given his whole interest in it, both at law and in equity, so far as the company knew, to the Loan Association; nor do I see anything in the subsequent dealings between the different parties concerned which make it inequitable of the defendants to set up that condition as a bar to the action; nor do I see anything inequitable on the part of the defendants to entitle the plaintiff to relief under the statute.

I think, upon the fourth plea, the defendants are entitled to retain their verdict, and that the plaintiff cannot, under the circumstances, plead any replication to it, under the statute or otherwise, which would be in any way serviceable to him.

The rule will be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

BILLINGTON V. THE CANADIAN MUTUAL FIRE INSURANCE
COMPANY.*Double insurance.*

The plaintiff having effected an insurance with defendants on his "stock manufactured and in process used for the manufacture of agricultural machinery," afterwards insured with another company his "agricultural machinery in process of construction, finished and unfinished."

Quere, whether the defendants' policy extended to finished machines, or only to parts, finished or unfinished, of machines yet in process of construction, but

Held, that the second policy covered at all events a part of the property included in the first, and that there was therefore a double insurance.

Held, also, that the construction of the policy, under the circumstances, was for the Court, not the jury.

The plaintiff, when he insured with the other company, was told by the agent, who was also the plaintiff's local agent, that he would give notice of it to the defendants; but it was sworn that this agent had no authority to receive notice of further insurances.

Held, that this was clearly no notice of or consent to the second insurance, as required by 36 Vic. ch. 44 sec. 37, 38, O.

ACTION on a fire policy.

The sixth plea set up a double insurance, which was traversed.

The cause was tried at the last Spring Assizes at Hamilton, before the Judge of the County Court of Wentworth; when a verdict was rendered by the jury for the plaintiff, and damages were assessed at \$2,210.

It was not disputed that there was another insurance effected by the plaintiff, but it was contended by him that the second policy was not upon the same goods which were covered by the defendants' policy.

The policy sued upon, was dated the 25th of September, 1874, and was for three years. It was for \$3,000 "on his stock manufactured and in process used for the manufacture of agricultural machinery, contained in stone building and frame additions, situate," &c.

The alleged further insurance was made by the policy of the Provincial Insurance Company, dated the 9th February, 1875, for three months. It was made "on agricultural machinery in process of construction, finished and unfinished, owned by the assured, and contained in a two

story stone building, with a one story frame addition, covered with shingles laid in mortar, occupied by him as an agricultural implement manufactory, situated," &c.

The fire took place on the 22nd of March, 1875.

The plaintiff in his examination said: "I would call the material and stock in hand, *stock on hand*. I would call this *stock* till work was put on it. Then I would call it *stock in process*, and when completed, *agricultural implements and machines*. In February, 1875, the works would be well on towards completion."

Cross-examination:—"In February, 1875, the different pieces of works were ready to be put together as machines. Up to the time the machines were completed, they were pieces ready to be put together, and would be called *in process of manufacture*. * * The Provincial Insurance Company's policy covered the same property to the amount of \$6,000, as was covered by the defendants' policy. * * "My total loss was \$26,800 by the fire: my total insurance was \$15,000."

Re-examination:—"When I said in cross-examination that the two policies covered the same material, I meant that some of the material covered by defendants' policy, was also covered by the Provincial Company's policy, as manufactured machines or implements."

The plaintiff said also in his cross-examination: "Mr. Suter was the agent of defendants' company and of the Provincial Company at Dundas. He told me he would give notice to the defendants of the insurance in the Provincial. I remarked to him that he was the agent of both companies, and I asked if he was going to notify these companies of the additional insurance, and he said he would do so. Trusting to his doing so, I did not further notify the companies or any other of their agents. I did not ask Suter to notify the companies, but he told me he would do so."

At the close of the plaintiff's case, the counsel for the defendants, moved for a nonsuit:

1. Because the 37th section of the 36 Vic. ch. 44, O., had not been complied with, the plaintiff having effected

a double insurance, and not having notified the defendants of it.

2. That the notice to Suter was not a notice in writing, nor a notice at all binding on the defendants.

The defendants' counsel contended that it was a matter of construction for the Court to determine, whether the later policy was or was not upon the same property which was covered by the defendants' policy.

The plaintiff's counsel argued that the two policies did not cover the same property.—one covered stock to be used in manufacture, the other stock manufactured or in process of being manufactured: that where the one policy ceased to apply, the other began to attach: that if it was necessary to give notice, notice had been given to the defendants by the notice and knowledge of Mr. Suter, their agent, and that Suter had a notice in writing of it, because, when he took the application of plaintiff for insurance in the Provincial Company, that was express notice in writing that the plaintiff was insuring or had insured with the Provincial.

The learned Judge noted his opinion fully in his notes. He expressed himself against the plaintiff, but he declined to nonsuit, reserving leave to the defendants to move the full Court if necessary.

The defence was then entered into.

The plaintiff was recalled by the defendants. The defendants' counsel asked him: "Did you expect that the defendants' policy would, or was it intended to cover stock after it was manufactured and ready for sale?" "It was. It was intended to cover parts of the machinery as they were ready to be put together. The words in the Provincial policy, in my opinion, cover the same property as in the defendants policy."

Cross-examination:—"When I said in examination in chief, to-day, that the Provincial policy covered the same property as the defendants' policy did, I meant that some of the material covered by the defendants' policy was also, when worked up into machines, covered by the Provincial policy. I understand the term 'manufactured stock' as

meaning parts of a machine completed, ready to be put together to form the machine. I consider the material when worked into the different parts as 'unfinished machinery.' I also consider that these different parts would be 'manufactured stock.'"

The secretary and manager of the defendants' company said local agents had no authority to receive notices of further insurance, and the defendants had no knowledge of the further insurance in the Provincial till after the fire, and he considered the property insured in the two policies to be the same.

Mr. Suter said he had no authority to receive notices of further insurance. The plaintiff asked him to notify the defendants of the insurance in the Provincial, and he promised to do so, but forgot it. He understood the property in the two policies was the same. The Provincial policy was intended to cover those machines reaching completion and completed.

Mr. O'Reilly, secretary of the Beaver Insurance Company, was of opinion the two policies covered the same property from beginning to end.

The learned Judge at the close of the evidence, was of opinion, especially from the evidence of the plaintiff, that the two policies covered the same property, and that the condition against further insurance was broken, but he declined again to nonsuit. He left several questions for the jury to answer; and their answers were as follows:

1. Was the insurance with the Provincial effected by the plaintiff? Yes.

2. If so, was it an insurance on any of the property covered by the defendants' policy? No.

3. Were the plaintiff's goods, or any part thereof, at the time of their destruction, stock manufactured, or was any part thereof, stock in process of manufacture? Yes.

4. Were the plaintiff's goods, or any part thereof, at the time of their destruction, 'agricultural machinery in process of construction and unfinished?' Yes.

5. Were any of the goods of the description mentioned in the fourth question, covered by the defendants' policy? No.

6. What was the value of the goods destroyed, covered by the defendants' policy? \$2,110, with interest; interest \$100. Verdict for plaintiff, and damages \$2,210.

During Easter term last, May 16, 1876, *Barry* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved, on the ground of the plaintiff having made a double insurance, as in the sixth plea mentioned, of which he had given no notice to the defendants: that there was no evidence to warrant a finding for the plaintiff, and the learned Judge should have entered a nonsuit, or have directed a verdict to be found for the defendants; or why a new trial should not be ordered, the verdict being contrary to law and evidence and the Judge's charge.

During this term, August 29, 1876, *B. B. Osler*, Q. C., shewed cause. The questions upon the sixth plea were for the jury to determine, and they have found for the plaintiff. There was not a double insurance as pleaded by the defendants. The two policies were on the same property, but upon it in its different states. The one policy began to attach when the other ceased to be applicable. That was all the plaintiff meant, when he said the two policies were upon the same property. The two policies never covered the same property while it was in any particular state, from the time it was stock on hand in its rough form, till it was manufactured and formed a completed machine.

He referred to 36 Vic. ch. 44 sec. 37, O., and to *Filschic v. Hogg*, 35 U. C. R. 94.

Barry supported the rule. The two policies covered the same property, and at the same time. That is their construction, and it was the opinion of those examined at the trial, including the plaintiff, and it was the opinion of the learned Judge. He referred to 36 Vic. ch. 44, secs. 37, 38, and to *Weinaugh v. Provincial Ins. Co.*, 20 C. P. 405.

September 26, 1876. WILSON, J.—It is the duty of the Court or the Judge to place the proper construction upon all written documents.

In many cases the writing may require to be explained, but when that explanation has been made, the construction of it remains with the Judge.

If it is disputed what the meaning of certain terms is, the evidence given to affix the true meaning to them must be left to the jury, and upon their finding the proper legal interpretation will then be given to it by the Court or Judge. All documents are to be construed in their primary sense, unless it appear they must be construed in some other sense.

It is disputed here whether the Judge or the jury should have determined the meaning of the language used in the two policies in question, so as to discover whether there was a double insurance upon the goods—that is, two insurances upon the same property at the same time.

The learned Judge received evidence of the meaning of the words used to describe the property. He then gave his opinion of the legal effect of the policies upon the evidence so given, and he also left the wording of the policies and the evidence so given as to their meaning to the jury, to say what meaning they attached to the language.

The learned judge was in favour of the defendants' reading. The jury were in favour of that of the plaintiff.

The defendants insured for the plaintiff "on his stock manufactured and in process used for the manufacture of agricultural machinery."

The Provincial Company insured for the plaintiff "on agricultural machinery in process of construction, finished and unfinished."

The defendants insured: 1. The stock manufactured of agricultural machinery; and 2. The stock in process of manufacture for agricultural machinery.

That would include all the stock but the rough or raw, or original materials, on which no work towards adapting it for agricultural machinery had been done. "The stock

manufactured" would include the finished agricultural machinery, and I think it would include also the stock manufactured into the different parts which are required to form the finished machine, but which had not been put together to make the completed articles, such as wheels and the various other matched parts which had been prepared and were ready for combination.

It was probably to make sure of such last mentioned portions being protected by the policy, that the second part of the goods was described as stock "in process" used for that purpose.

There seems to be no difficulty in comprehending that policy in its ordinary, plain, and primary sense. There are no technical or scientific terms used, nor is there any ambiguity to be cleared up, nor is there any usage or custom to give a different meaning to the language, nor are there any surrounding circumstances which have to be narrated in order to shew what it was the parties were bargaining about, or that any special meaning was attached to any of the expressions. The document was therefore for the Court to expound, and not for the jury.

What then is the reading of the second policy? It was "on agricultural machinery in process of construction, finished and unfinished." That, like the preceding policy, did not cover the raw or original materials. It covered, certainly the agricultural machinery "in process," whether it was finished or unfinished. But did it cover the finished machines? It is not clear that it did. The words "finished and unfinished" seem to apply to that part only of the machines or machinery which was in process of construction. If the policy had been "on agricultural machinery, finished and unfinished," the perfect machine as well as the component parts of it would have been plainly within the terms. But when the words "in process of construction," come in before "finished and unfinished," the generality of the words "agricultural machinery," seems to be altered and narrowed to such parts of it as were "in process of construction" only.

It is possible to read the policy, with some little violence, as applicable to the finished machine, as well as to those parts of it which were in process of construction. If it be so read, then it is identical with the defendants' policy. If it be restricted to such machinery as was in process of construction, it is still identical so far with a part of the defendants' policy. It is then of no consequence whether the second policy is so extensive as to cover the perfect machine as well as the separate parts of it, as may be the case, or whether it is limited to the separate parts only; for in either event the result is the same, that there was a double insurance.

The plaintiff's own evidence shews he meant to insure the same property with the Provincial which he had insured with the defendants, and his policy with the Provincial specifies the defendants' prior insurance as a further insurance, and the plaintiff desired Mr. Suter, the agent, in accepting risks for the two companies, to notify the defendants of his further insurance being made with the Provincial. The notice to Mr. Suter of such further insurance was not a notice to the company in any form, for he had no authority to receive such a notice; his duty was completed by the acceptance of the risk. He had no power to modify it, nor to receive anything, nor to do anything farther than to accept of risks and to forward the applications to the head office of the company.

I agree with the ruling and opinion of the learned Judge who tried the cause, and I differ from the jury, who found that none of the plaintiff's goods which were "agricultural machinery in process of construction and unfinished," were covered by the defendants' policy. I think they were, and I am of opinion there was nothing in the defendants' policy which required to be submitted to the jury for their interpretation, and that their opinion is neither authoritative nor correct.

The rule must be absolute to enter a nonsuit

HARRISON, C. J., and MORRISON, J., concurred.

Rule absolute.

MORROW V. WATERLOO COUNTY MUTUAL FIRE INS. CO.

Insurance—Certificate of nearest magistrate—Reasonable condition—36 Vic. ch. 44 sec. 33 ; 38 Vic. ch. 65 sec. 1, O.—Pleading.

The policy of a mutual company required a certificate of the loss, &c., under the hand of the magistrate or notary public most contiguous to the place of the fire; and there was a plea that the plaintiff had not furnished such certificate, on which issue was joined. The plaintiff at the trial applied for leave to reply: 1. That it was by accident or mistake that it was not furnished; 2. That defendants did not within a reasonable time object to the proofs as regarded this certificate; and 3. That the condition was unreasonable. It appeared that the certificate furnished was by a magistrate of another county, who had not enquired into the circumstances: that there were suspicions as to the fire; and that the two nearest magistrates would not have given the necessary certificate. The learned Judge, after hearing this evidence, refused to add these replications, and found as a fact that it was not by accident or mistake the certificate was not furnished, but that the plaintiff refrained from applying to the proper magistrates because he knew they would refuse.

Held, that under 36 Vic. ch. 44, sec. 33, O., the plaintiff might insist that the condition was unjust or unreasonable without specially pleading it; but that it was clearly not unjust or unreasonable; and the Court, under the Administration of Justice Act, sec. 34, refused a new trial on the ground that the objection was not allowed at the trial.

Seemle, that a demurrer is the proper mode of raising the question.

Held, also, that the non-compliance with the condition was not excused under 38 Vic. ch. 65, sec. 1, the omission to give the certificate not having been caused by necessity, accident or mistake, and the statement or proof of loss not having been given in good faith. A nonsuit was therefore upheld.

The facts relied upon to bring the case within that section must be pleaded.

ACTION on two policies. First count on a policy upon drugs and medicines contained in a frame store, situate on Main street, in the village of Cheltenham, in the county of Peel.

Second count on a policy upon liquors, &c., patent medicines, &c., in the same premises.

Third plea to first count, that the plaintiff did not furnish a certificate under the hand of the magistrate or notary public most contiguous to the place of the fire, as required by, and in accordance with the covenant and agreement in that behalf contained in the policy.

Eighth plea to second count, similar to third plea to first count.

Issue.

The cause was tried before Moss, J., at the last Spring Assizes held at Brampton.

The plaintiff was nonsuited, because he had not observed the condition in the pleas above mentioned.

On the opening of the case the plaintiff's counsel applied for leave to reply to these pleas:—1. That it was by accident or mistake the certificate was not furnished. 2. That the defendants did not object to the proofs put in within a reasonable time, as respects the certificate of the magistrate. 3. That the condition was unreasonable.

It was agreed that a jury should be called, and that evidence should be entered into as to whether it was by accident or mistake the certificate was not furnished, and that the learned Judge should then determine what course to take.

William Allan, said: I am a magistrate, and have been so for many years. I am now a magistrate in Halton. I used to be a magistrate for the county of Peel. The declaration and certificate produced was made before me. I moved into Halton in 1839, and have lived there ever since. I recollect the circumstances connected with the declaration and certificate. The plaintiff and his brother, Dr. Morrow, came to me and said they had sent a list to the company before, and that the company had objected to it, requiring further details. The plaintiff was about to hurry away to make an affidavit. I thought he might as well make it in the county of Halton as in the county of Peel, and that the company would make no objection to it. I said so to them. I signed the certificate. I thought if I could take the affidavit I could give the certificate. I never thought of my being a magistrate of another county. I had known plaintiff and his brother since their infancy. That made me give the certificate readily.

Cross-examination—I did not notice that I had to certify as to character. I live 14 or 15 miles away. I asked no questions about the fire. I had not been at the fire. I made no examination about the matter of the fire. I would not have given such a certificate as the policy I now look at demands.

Re-examination—They came to me twice; the second time to make out the statement in detail.

John H. Morrow, plaintiff, said in cross-examination: I won't swear I knew Mr. Henry was the nearest magistrate. I knew Mr. Lynes in Cheltenham was a magistrate. I did not know that it was then suspected the fire was caused by me. I spoke to Mr. Henry, or he to me, about the fire. I did not know that Henry or Lynes would not have certified to the fire being accidental. I knew Haynes was a magistrate living near. I made the second affidavit before Mr. Storey, the reeve of Acton. I did not know I was presenting a certificate that was not true. I knew that Mr. Allan had not examined into the circumstances of the fire. It may be ten or twelve miles to Cheltenham from Acton. There were three magistrates in or near Cheltenham. There was an inquest with relation to this fire about the end of June or beginning of July. I can't say I then knew of Mr. Henry's suspicions. I did not hear, as I know, of any one accusing me of the fire. The fire happened on the 3rd of April. I swear I never read the policies.

Defence.

Wm. Henry: I am a magistrate of Peel; reside in Cheltenham. The plaintiff lived in the next building to me; about four feet between us. I do not know that he ever tried to get a certificate from a magistrate in Cheltenham. There were suspicions from the start about the fire. Mr. Haynes and Mr. Lynes were magistrates in the immediate neighbourhood. Mr. Lawrence, a magistrate, lives within half a mile of the plaintiff's father. I would not have granted a certificate to the plaintiff under the circumstances.

Charles Haynes, said: I am a justice of the peace of Peel. Have been since 1862. I know plaintiff. Live about a quarter of a mile from the village. There was a rumour about the fire being a suspicious one. If I had been applied to for a certificate I could not conscientiously have given it. Nearly every one around talked about it, and thought it was not an accident.

Cross-examination: I know that plaintiff was afterwards tried and acquitted for arson.

Mr. *Lynes* gave the like evidence.

The learned Judge then refused leave to add the replications asked for. He noted that he said: "I hold that as a matter of fact, it was not through necessity, accident, or mistake, that the certificate of Mr. Allan was procured. The plaintiff upon examination convinced me that he refrained from applying to the magistrates at Cheltenham, because he knew he could not get the required certificate from any of them. I find the certificate of Mr. Allan was not forwarded in good faith. Upon my refusing to add these replications, Mr. Cameron admits that he must be nonsuited, unless in the present state of the pleadings he is entitled to a judgment: that the clause is unreasonable and void. This I decline to hold, and the plaintiff is therefore nonsuited."

During Easter term, May 19, 1876, *J. Hillyard Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial ordered, on the ground that the nonsuit was against law and evidence, as the plaintiff was entitled to shew, without any special replication to that effect, that the condition in the policy requiring a certificate from a magistrate or notary public most contiguous to the place of the fire, was unreasonable and unjust; also, that evidence might be given without any replication that the defendants had lost their right by their conduct to insist upon any such certificate; also, that evidence might be given that such certificate was given by accident or mistake, without any special replication to that effect; also, that if necessary the learned Judge should have allowed the replications that were moved by the plaintiff on the said several points to be put in at the trial.

In this term, September 8, 1876, *M. C. Cameron*, Q. C., shewed cause. The learned Judge refused to allow the pleadings to be amended at the trial to let in the replications referred to, and he refused to hear evidence on the issues as they stood, that the condition was unreasonable and void.

Under the statute 38 Vic. ch. 65, sec. 1, O., he rightly refused to aid the plaintiff upon the evidence which he himself gave, and he rightly excluded the evidence upon a mere issue taken on the pleas.

J. H. Cameron, Q. C., supported the rule. The nonsuit would have been right but for the statute just mentioned. But under that statute which was intended to aid just such defects as the defendants were taking advantage of in the present case, the plaintiff should have been allowed either to amend his pleadings or to give evidence upon the record such as he proposed to give as it then stood.

The certificate of the magistrate is a part of the proof of loss, for until it is produced the loss is not payable. The magistrate who gave the certificate here was not the nearest magistrate to the place of the fire. That is a matter which, by the statute, the plaintiff should have been relieved against.

September 26, 1876. WILSON, J.—At the trial the plaintiff's counsel desired among other answers, to reply that the condition pleaded in the third and eighth pleas was unreasonable. It was agreed evidence should be taken for the purpose of enabling the learned Judge to determine whether it was by accident or mistake the certificate was not furnished in the manner which, and by the person who was required by the condition to furnish it.

The evidence was taken, and the learned Judge refused to allow the replications to be added.

The plaintiff's counsel then admitted he could not proceed unless he was at liberty to shew the unreasonableness of the condition upon the issues then found on these pleas. But the learned Judge declined to hear such evidence. The plaintiff's rule raises that question.

The 36 Vic. ch. 44, sec. 33, O., enacts that "Every condition endorsed upon or affecting any policy of insurance which shall be held by the Court or Judge before whom any question relating thereto shall be tried not to be just and reasonable, shall be absolutely null and void."

The matter has to be determined by a Court or a Judge.

If it had to be tried by a jury, the plaintiff would have been bound to reply that the condition was not just and reasonable. But as it is to be tried by the Court or Judge, it is not necessary such a replication should be pleaded if all the facts sufficiently appear upon the record to enable it to be decided whether such a condition is just and reasonable or not.

Here the condition is set out—all the facts appear from which its effect can be determined. It is not suggested that any other circumstances are necessary to be stated to enable its reasonableness to be judged of. The plaintiff asked leave only to aver that it was not just and reasonable, or to be allowed to have that fact decided upon the mere issue joined upon the pleas.

I am of opinion that by the rules of pleading the Judge could have determined the validity of that condition upon the pleadings as they stood at the trial, and as they now stand. The plaintiff might have raised the question of its reasonableness if he had desired to do so by a demurrer, because that question is sufficiently presented upon the record. A replication that the condition was not just and reasonable is not required. It is for the defendants, who have pleaded it, to shew it is just and reasonable, for if they do not shew that, then it is "absolutely null and void."

The cases on the point to which I may refer have arisen under the Imperial Railway and Traffic Act of 1854.

In *Simons v. Great Western R. W. Co.*, 18 C. B. 805, the third and fourth pleas relied upon certain conditions contained in the document relating to the carriage of the goods. The plaintiff joined issue. He also replied, setting out the document in full, with all the conditions, and then averred that the contract was made after the Traffic Act; that the loss of and damage to the goods was by the default or neglect of the defendants in the receiving, forwarding, or delivery of the goods; and that by virtue of the Act, the defendants were liable, notwithstanding the conditions, and that the contracts were void.

The defendants rejoined that the conditions in the replication and pleas mentioned were just and reasonable, and also demurred to the replication, because, among other causes, the plaintiff ought to have shewn that the terms of the contract were unjust and unreasonable.

The plaintiff demurred to the rejoinder because "it referred matter of law to the jury; and that the reasonableness of the conditions was matter to be determined by the Court and not by the jury."

In the course of the argument, which raised much more important matters for decision than the one as to the mode of raising the fact of the reasonableness or unreasonableness of the conditions for decision, it was contended the replication should have averred the unreasonableness; and, on the other side, that the rejoinder was bad for doing so.

And when the defendants' counsel asked leave to have the rejoinder amended in that respect if necessary, Cresswell, J., said, p. 824, "If it is set out, and it is for the Court, it is not necessary to aver it."

Jervis, C. J., "I think it is quite sufficiently brought before us."

In giving judgment the Chief Justice said, p. 830, "I think the matter is sufficiently brought before the Court to enable us to decide it, and that the fourth plea, which states that the goods were to be carried at a certain special mileage rate, * * is a good plea. As to the third plea, I think it is a bad one, inasmuch as it seeks to relieve the company from the consequences of the loss or non-delivery of the goods, by reason of insufficient or improper package, which in my judgment is not reasonable as a ground of relief. I think the Court is bound to look at the particular matter in each case, to see whether the condition is just and reasonable or not."

In another case on the same page, which was considered along with the preceding one, the Court could not give judgment on it, as the County Court Judge had not sent proper materials to enable the Court to say whether the contract was just and reasonable or not.

In *McManus v. Lancashire and Yorkshire R. W. Co.*, 2 H. & N. 693, the condition was pleaded, and issue taken on it, and the question of reasonableness or not was determined on that issue.

The same in *Lewis v. Great Western R. W. Co.*, 5 H. & N. 867. In that case Channell, B., said, at p. 870: "Where the pleas set out the conditions, as here, must not the objection that they are unreasonable be taken by demurrer?"

In *Peck v. North Staffordshire R. W. Co.*, E. B. & E. 958, the fourth plea stated the condition simply. The fifth plea stated it as a just and reasonable condition, upon which issues were joined. The Judge at the trial decided on the reasonableness of the conditions in and as to both pleas.

In *Harrison v. The London, Brighton, and South Coast R. W. Co.*, 2 B. & S. 122, the pleas set out the conditions, on which issues were taken. On a case reserved, the Court determined the conditions to be unreasonable.

Upon principle, as well as upon the decisions referred to, the fact of reasonableness need not be averred in the plea, nor if it be not in the plea, need the unreasonableness be averred in the replication. The question may be raised by a demurrer, which seems the more correct way of raising it; but the Judge may also determine it at the trial upon an issue joined on a plea setting out the carriage of the goods, &c., upon the conditions relied upon.

The plaintiff was therefore at liberty to dispute at the trial the reasonableness of the condition. It was a matter for the defendants to establish in the first instance. That course was not adopted. Should we therefore grant a new trial?

By the Administration of Justice Act, 1874, sec. 34, "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless, in the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action."

Has any substantial wrong or miscarriage been occasioned in the trial of the action?

Is there any ground or pretext for alleging that the condition in question is unreasonable? I think there is not. The case of *Worsley v. Wood*, 6 T. R. 710, is a decision upon the like condition, and judgment was arrested, because that condition was not averred to have been complied with.

Lord Kenyon, C. J., said, p. 718: "That this is a prudent regulation this very case is sufficient to convince us."

Ashurst, J., said, p. 720: "Nor is there anything unreasonable in these terms."

Lawrence, J., said, p. 722: "These terms seem highly reasonable; it is a duty that the office owe to the public as well as to themselves to take every precaution to protect them against fraud; and unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses."

In that case it was averred that the minister and churchwardens who, with some respectable householders of the parish, were required to give the certificate, refused to give it without any reasonable or probable cause for their refusal; but that four respectable householders of the parish gave it.

The Court said such a certificate could not be received in place of the one bargained for, for if such a certificate could be substituted, the plaintiff might equally claim that a certificate granted by the inhabitants of the next or any other parish would have answered the purpose.

It has never been disputed to the present time that such a condition is a reasonable one, and the facts of this case do very forcibly prove the propriety, necessity, and safety of such a regulation.

There was a suspicion entertained in the village that the plaintiff had destroyed his own premises. There was a magistrate living within a few feet of him at the time. There were other magistrates in the village, and close to it. The plaintiff made no application to them for a certificate as to his character, nor did he apply to any one who had made diligent enquiries, and was of opinion that the plaintiff had really by misfortune, and without fraud, evil practice,

or culpable carelessness, sustained loss to the amount claimed by him ; but he got such a certificate from a magistrate in the adjoining county, and at a distance of fourteen or fifteen miles from the place where the insured property had been ; and he got that magistrate to certify that "from diligent enquiries" made by him, he was of the opinion that the plaintiff had really by misfortune, and without fraud, &c., sustained loss to the amount which was claimed, although he knew the magistrate had not examined into the circumstances of the fire ; and that all the magistrate knew of his loss was what he himself told to him ; and the magistrate had to admit that he asked no question about the fire, and that he had not been at it, and that he had made no examination about it.

The Judge at the trial could not do otherwise than have held such condition to be just and reasonable upon the evidence if he had specially tried it. He did, in effect, do so, because he refused to allow a replication to that effect to be added after hearing all that evidence.

We think, therefore, under the statute we have referred to, there has been no substantial wrong or miscarriage occasioned on the trial of the cause, and that the nonsuit should not be vacated for that cause.

As to the other branch of the rule, which was moved upon the 38 Vic. ch. 65, sec. 1, we are of opinion that it was not "by reason of necessity, accident, or mistake, the condition of the contract as to the proof to be given to the company after the occurrence of the fire had not been strictly complied with ;" and we are also of opinion that this was not a case in which the "statement or proof of loss has been given in good faith by the insured," so that the want of objection by the company to this specific defect, or the absence of all objections within a reasonable time, can aid the insured.

The learned Judge was quite right in deciding that the certificate sent was not delivered in good faith, and that there was no necessity, accident, or mistake, in seeking such a certificate.

We think the one sent was deliberately sent to evade or avoid the condition in question, and to impose upon the company.

I am of opinion the facts which are relied upon as bringing the case within the first section of that Act should appear in the declaration, or it may be in some cases in the replication. They should be pleaded, so that the Court or Judge may be able to see whether the case is brought within the protection of the section.

The plaintiff was not at liberty, after denying simply the truth of the pleas, and after averring a literal performance of all conditions in the declaration, to give evidence, upon the pleadings as they stood, of a non-performance of them by reason of necessity, accident, or mistake, or by an averment that he had acted in good faith, and that no such objection was taken to the certificate given in as that which was relied upon by the company. It was necessary to plead such matters; and upon the evidence the learned Judge rightly declined to aid the plaintiff. If such matters could have been given in evidence without their appearing on the pleadings, we should, for the like reason which has induced us to refuse relief to the plaintiff on the question of the alleged unreasonableness of the conditions, have held the plaintiff within the 34th section of "The Administration of Justice Act, 1874."

Upon all grounds we think the rule should be discharged.

MORRISON, J., concurred.

HARRISON, C. J., took no part in the judgment.

Rule discharged.

DAVIS V. THE CANADA FARMERS MUTUAL INSURANCE COMPANY.

Insurance—Limitation of action—Waiver of conditions—Prevention of suit by negotiations—Corporation—Liability on parol contract—Admissibility of counsel as witness—New trial—A. J. Act 1874, s. 34.

It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants therein after the lapse of one year from the loss, this being a condition also prescribed by the 36 Vic. ch. 44, sec. 54, O., relating to mutual fire insurance companies.

The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count, that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending; and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff \$500 in full, which they had not paid.

The fire took place on the 18th August, 1874. The claim papers were sent in on the 15th September. On the 28th October, the plaintiff was required to produce his books, invoices, vouchers, &c. He then placed his claim in the hands of an attorney, who wrote to defendants, and was told that without the books there could be no settlement. On the 26th February, 1875, he authorized certain creditors of his to settle the claim as they might think proper. These creditors employed other attorneys, who wrote to defendants on the 10th April, threatening a suit, after which defendants' general manager called on them, and had an interview "without prejudice," in which he made an offer of \$500, which was not then accepted. On the 20th April, the attorneys wrote to the manager offering to take \$800, and saying that unless the claim was settled at once they would sue on the policy. On the 26th April, the board met, when this offer was declined; and the manager, who was called by the plaintiff, swore that this decision of the board was at once communicated to the attorneys. Nothing more took place until 18th September, when the attorneys wrote accepting the offer of \$500. The defendants took no notice of this or of a subsequent letter of the 15th November; and this action was brought on the 9th December. One of the attorneys, who was also junior counsel for the plaintiff at the trial, being called as a witness, swore that a few days after the letter of the 20th April the manager called on them, talked of a settlement, for which he seemed anxious, and said that if two other companies interested would each pay \$100 more defendants would do so as well. One of the attorneys denied notice of the resolution refusing their offer of \$500, but admitted that the manager told him then

that defendants declined it. No mention was made of the limitation clause during the negotiations.

Held, that there was no evidence to go to a jury either of the agreement alleged, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent the defendants from insisting on the forfeiture.

Seemle, that defendants could not be bound by the agreement alleged to pay the \$500, unless under their corporate seal.

Review of the cases as to the liability of a corporation by parol, both at law and in equity.

The senior counsel for the plaintiff at the trial, a partner of the attorney above mentioned, offered himself also as a witness for the plaintiff, to corroborate the evidence of his partner, but was rejected, the learned Judge saying that he must choose between the positions of advocate and witness, and must cease to act as counsel if he desired to give evidence. *Held*, that he was a competent witness, and could not properly be rejected; but a new trial was refused upon this ground, under 37 Vic. ch. 7, sec. 34, the Court being of opinion that no substantial wrong or miscarriage had been occasioned thereby.

Remarks upon the impropriety of such evidence, though strictly admissible.

THIS was a declaration "on equitable grounds."

The first count alleged that, by a policy of insurance, dated 4th March, 1874, sealed with the common seal of the defendants, in consideration of the sum of \$80, the defendants insured the plaintiff against loss or damage by fire to the amount of \$1,000, on the stock of hardware contained in a frame building situate on the south side of Main Street, in the village of Springfield, during the space of three years, from 20th February, 1874, at twelve o'clock noon, until 20th February, 1877, at twelve o'clock noon; the loss or damage to be made good to the plaintiff within three months after due notice and proof thereof made in conformity to the by-laws of the defendants and conditions annexed to the policy, one of which was that no action or suit, either at law or in equity, should be brought against the defendants on the policy after the lapse of one year next after the happening of the loss or damage, which last-mentioned condition was endorsed on the policy under and by virtue of sec. 54 of 36 Vic. ch. 44, O. The count then averred the interest of the plaintiff to the full amount insured, and the loss of the insured premises by fire: that the plaintiff duly proved and notified the defendants of the loss, and, before the lapse of one year next after the hap-

pening of the loss, the defendants, by the means herein-after in this count mentioned, hindered and prevented the plaintiff from suing—that is to say, it was agreed between the defendants and the plaintiff, that if the plaintiff would permit the defendants and give them time and opportunity to examine the books and accounts, and otherwise as they should see fit examine into and investigate the loss and damage, the defendants would thereupon pay the same to the plaintiff in manner and form as the plaintiff and defendants should agree in that behalf, provided the plaintiff should refrain, during all the time of such examinations and investigations, and during all the time that negotiations should be pending, from in any manner suing the defendants concerning the premises; and in consideration thereof the defendants would waive and discharge the plaintiff from the performance of the said condition as to time for bringing the action, and would also waive all benefit to the defendants in that behalf of the 54th section of the statute. The count averred that the defendants then commenced their examinations and investigations concerning the premises, and then commenced to negotiate with the plaintiff in that behalf, and continued all such examinations, investigations and negotiations, thenceforth until after the expiration of the year: that the plaintiff always refrained from suing the defendants previous to the commencement of this suit; that before the commencement of this suit all examinations, &c., had terminated and the plaintiff and defendants were wholly unable to agree in that behalf; yet defendants have not made good the damage, &c., although requested so to do.

The second count repeated most of the allegations contained in the first count as to the policy, payment of premium, conditions, fire, notice of loss, proofs, &c., and then alleged that the defendants hindered and prevented the plaintiff from suing within the year next after the loss in manner following: that is to say, the defendants continually, before the lapse of the year, informed the plaintiff, and alleged, while the plaintiff denied, that the plaintiff's

proofs and notifications to the defendants of his loss were insufficient and informal, and that the plaintiff had in other respects failed to perform the stipulations and conditions to which the policy was subject, and that by reason thereof, and by reason also of certain alleged misrepresentations of the plaintiff, the plaintiff was precluded from recovering, either at law or in equity, to any extent whatever against the defendants ; but to end and determine all such disputes so then pending amicably and without litigation, the defendants would nevertheless, if the plaintiff would afford them the time and opportunity to fully satisfy themselves, by examination of the plaintiff's books and accounts, and in such other manner as the defendants should see fit, and not commence this action against the defendants while they should be so satisfying themselves concerning the premises, pay the plaintiff all that the defendants, upon such investigation, should find the plaintiff justly and honestly entitled to recover from the defendants, and which the plaintiff and defendants should agree upon as the proper amount in that behalf. The count then averred that the defendants, before the expiration of the year, commenced their investigations, and commenced negotiations with the plaintiff, and continued such investigations and negotiations until after the lapse of the year, and thenceforth until shortly before the commencement of this action, when it was finally agreed between the parties that the defendants should pay the plaintiff, upon request, the sum of \$500, in full satisfaction of the plaintiff's alleged causes of action, which the plaintiff was ready and willing to accept ; yet the defendants have not paid the same, although requested so to do.

The defendants pleaded, to the first and second counts :

1. *Non est factum.*

2. That they did not hinder or prevent the plaintiff, as alleged.

To the first count :

3. Denial of waiver of performance of conditions.

4. Denial of the agreement in that count alleged.

The defendants also pleaded, to the first and second counts :

5. That the plaintiff in his application for insurance, stated an excessive value of the property insured, contrary to a condition endorsed on the policy.

6. False and fraudulent swearing by the plaintiff, as to the amount of his loss, contrary to a condition endorsed on the policy.

7. Denial of the destruction of the premises by fire, as alleged.

8. Denial of plaintiff's interest.

9. And, for a further plea to the first count, the defendants denied the promise in that count alleged.

10. And, for a further plea to the second count, the defendants denied that there was any agreement as to the proper amount to be paid to the plaintiff.

11. And denied that they did, in so far as the \$500 was concerned, waive or abandon the conditions.

The defendants also demurred to the first and second counts of the declaration, upon various grounds not necessary to be stated.

The plaintiff took issue on the eleven pleas of the defendants, and joined in demurrer to each count of the declaration.

An order was made by Mr. Dalton for the trial of the issues in fact before the trial of the issues in law.

The issues in fact came on for trial at the last Spring Assizes for the county of Wentworth, before Sinclair, Co. J., sitting for Wilson, J., and a jury.

The plaintiff commenced business as a hardware merchant at the village of Springfield, in the county of Elgin, in September or October, 1873.

On 20th February, 1874, he made a written application for insurance with the defendants, to the value of \$1,000, on his stock of hardware, valued in the application at \$4,000. His stock at the time was not of that value, but he represented to the agent that he intended to make it of that value, and the agent was apparently satisfied with his

promise, although the plaintiff, at the time was insured in the Provincial Insurance Company for \$1,000, and for \$1,000 in the Beaver and Toronto Mutual, on the same stock of hardware.

On the same day that the plaintiff applied to Mills, the agent of the defendants, for insurance, he, the plaintiff, received an interim insurance receipt, in consideration of his premium note for \$80.

The risk was accepted by the board of directors, and on 4th March, 1874, a policy, under the corporate seal of the defendants, was issued to the plaintiff in the terms of the application and of the interim receipt. In other respects the policy was as described in the declaration.

The thirteenth condition endorsed on the policy was as follows: "No action or suit, either at law or in equity, shall be brought against the said company upon this policy or contract of insurance already granted or entered into, or that may hereafter be granted or entered into, by the said company, after the lapse of one year next after the happening of the loss or damage in respect of which such action or suit is brought."

On the 18th August following, the plaintiff's premises were destroyed by fire. He, on the same day, by telegram, informed defendants of his loss—"cause unknown"; and on the same day the defendants forwarded to the plaintiff a form of affidavit to be filled up with details of the loss.

On 3rd September following, the plaintiff made affidavit of his loss, shewing the value of his stock at the time of fire \$3,335 03

Goods saved 136 61

Actual loss \$3,198 42

His liabilities at the time of the fire were \$2,857.36.

On 15th September, 1874, the receipt of the claim papers was acknowledged in writing by a clerk in the office of defendants, in the name of Mr. Street, the secretary-treasurer of the company, who promised to lay them before the board on the next day.

The plaintiff was afterwards notified of an assessment

on his premium note; but this was sworn by Mr. Street to have been a mistake on the part of the clerk who had the premium notes in charge.

On 28th October, 1874, W. T. O'Reilly, Esq., the secretary of the Beaver and Toronto Mutual Insurance Company, notified the plaintiff in writing that he was required, on behalf of the Canada Farmers' Insurance Company and the Beaver and Toronto Mutual Insurance Company, to produce his books of account and other papers, vouchers, original or duplicate invoices, and permit extracts to be made and copies thereof taken, if necessary, in accordance with the terms of his policy.

The plaintiff shortly afterwards placed his claim in the hands of Colin McDougall, attorney, of St. Thomas, who wrote to the Beaver and Toronto Mutual Fire Insurance Company and other companies for a settlement.

In answer, the secretary of the Beaver and Toronto Mutual Fire Insurance Company wrote to the attorney in effect that without the production of the books there could be no settlement.

On 26th February, 1875, the plaintiff, by letter of that date, addressed to Messrs. Morland, Watson & Co., and Messrs. C. Cameron & Co., creditors of his, authorized and empowered them to settle, adjust, and compound, in such manner and for such amount as they saw fit, all claims for loss sustained by him against the Provincial Insurance Company for \$1,000, the Beaver and Toronto Mutual Fire Insurance Company for \$1,000, and the defendants' company for \$1,000.

The creditors placed the demands in the hands of Messrs. Martin & Carscallen, attorneys, of Hamilton, for collection.

The latter, on 10th April, 1875, wrote to the defendants threatening suit if the amount claimed—\$1,000—were not at once paid.

Mr. Street, the secretary and treasurer and general manager of the defendants' company, after the receipt of this letter, called on the attorneys and had an interview with them "without prejudice."

Mr. Street did not, according to his evidence given at the trial, ask for a settlement. He stated that the company believed the plaintiff guilty of fraud and false swearing. Mr. Street, however, admitted to have made an offer "without prejudice." He said, rather than have any trouble, the defendants would pay \$500 for their proportion of the loss, but that offer was not at the time accepted.

On 20th April, 1875, the attorneys wrote a letter to Mr. Street, in which they said they had conferred with their clients, and were instructed to say that they would be willing to accept \$2,400 in full of the whole claim, *i. e.*, \$800 from each company. In this letter they stated that unless the claim was settled at once they would sue on the policy.

On 26th April, 1875, the board of directors of defendants met, and the letter of 20th April from the attorneys having been read, the board declined to entertain the offer therein made.

Mr. Street swore that immediately after the decision of the board he communicated its decision to the attorneys, and "that nothing whatever concerning the settlement took place from that time until 20th September, 1875."

Mr. Carscallen, one of the attorneys, who was also junior counsel for the plaintiff at the trial, was examined, without objection, as witness for the plaintiff.

He swore that the offer of \$500 made by the defendants, or \$1,500 for all the companies, was submitted to Mr. Cameron, who thought the offer too small; and the consequence was the letter of 20th April, 1875, to Mr. Street. He also swore that a day or two after the last-mentioned letter Mr. Street called at his office, and appeared anxious for a settlement and talked of it, and said that if each of the other companies would pay \$100 additional, his company would do so. The witness swore that Mr. Street never told him that the company had passed the resolution of the 28th April, 1875, but admitted that he, Mr. Street, said his company declined to pay \$800. Mr. Carscallen said that on the second occasion Mr. Street remarked he would like the plaintiff to accept the \$500 offer: that he,

witness, said the deduction was too much : that Mr. Street said if the other companies would increase their offer \$100 each that defendants would give \$100 more ; and that so it remained till witness wrote the letter of 18th September, 1875.

Mr. Martin, the senior counsel for the plaintiff, then tendered himself as a witness for the plaintiff. The learned Judge asked him which position he intended to occupy—witness or counsel. Mr. Martin refused to make any election, and again tendered himself as a witness for the plaintiff, and insisted on his right at the same time to continue as senior counsel for the plaintiff. The learned Judge rejected his evidence, saying “ if Mr. Martin would place the brief in the hands of some other gentleman competent to hold it, he would receive his evidence—otherwise not.”

Some evidence was then given in support of the plaintiff's testimony as to the amount of the loss.

The letter of 18th September, 1875, from the plaintiff's attorneys to Mr. Street, which was written after the expiration of the year for bringing the action, was an acceptance of the offer of \$500 from defendants, or \$1,500 for all defendants, in settlement of the plaintiff's demand.

The defendants took no notice whatever of this letter.

On 15th November, 1875, the attorneys again wrote to the defendants, saying that if the \$500 were not paid at once a suit in equity would be instituted without further notice.

The defendants paid no attention to the second letter.

This suit was therefore instituted on 9th December, 1875.

Counsel for the defence, at the close of the plaintiff's case, moved for a nonsuit, on the following grounds :

1. Under the policy no action can be maintained unless brought within one year from the time of the fire.

2. There was no evidence that defendants hindered or prevented the plaintiff from commencing the action within the year.

3. Nor that defendants waived and discharged the plaintiff from the performance of the condition.

4. It was proved that the value of the plaintiff's property never was the amount stated in his application for insurance, viz, \$4,000.

5. Plaintiff swore to a loss of \$3,198.42, whereas the evidence shewed that the loss did not exceed \$2,400.

6. There was no evidence of the agreement to pay \$500, mentioned in the second count.

The learned Judge, after hearing counsel for the plaintiff in answer to the motion, nonsuited the plaintiff.

The learned Judge was of opinion that the negotiations for a settlement, carried on as they were, "without prejudice," were never intended by either party to affect the legal rights of the parties: that the defendants, by the action of the board of directors, on 18th April, 1875, declined the plaintiff's offer: that this was known to the plaintiff in time to have brought an action within the year: that the negotiations carried on in the manner detailed in the evidence were not sufficient to submit to the jury on the question whether the defendants hindered or prevented the plaintiff from commencing his action; and that even if what occurred in regard to settlement could, although "without prejudice," be given in evidence, the delay for five months was a mutual cessation of negotiations. The learned Judge also thought that the action of the secretary in the informal manner mentioned by Mr. Carscallen could not, after the formal decision of the board, bind the defendants.

The plaintiff's counsel objected to the ruling of the learned Judge in point of law, but in deference to it accepted a nonsuit.

During Easter term, May 18, 1876, *J. K. Kerr*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and for a new trial, upon the grounds: 1. That there was evidence to go to the jury given on behalf of the plaintiff, upon which the jury could properly have found a verdict with damages in

favour of the plaintiff upon the issues joined in this suit between the parties. 2. The learned Judge who presided at the trial improperly rejected the evidence of Richard Martin, tendered on behalf of the plaintiff, and refused to permit said Richard Martin to be examined, and prevented him from being examined as a witness on behalf of the plaintiff on the trial, although the said Richard Martin was then and there duly offered and ready to testify as such witness on behalf of the plaintiff. And because the said nonsuit was contrary to law and evidence.

During this term, September 2, 5, 1876, *MacKelcan*, Q. C., shewed cause. As the condition as to bringing the action within a year is not only a part of the defendants' contract under their corporate seal, but a portion of the Act of Parliament, 36 Vic. ch. 44, sec. 44, O., no waiver by parol can be sufficient: *Merritt v. Niagara District Fire Ins. Co.*, 18 U. C. R. 529, 532. The learned Judge was right in refusing to allow Mr. Richard Martin to act as an advocate and a witness: *Benedict v. Boulton et al.*, 4 U. C. R. 96; *Cameron v. Forsyth*, *Ib.* 189; *Stones v. Byron*, 4 D. & L. 393; *Rex v. Brice*, 2 B. & Al. 606; *Cobbett v. Hudson*, 1 E. & B. 11; *Best on Evidence*, 6th ed., 262, 270, sec. 184 *et seq.* But if not, his evidence was only to corroborate the testimony of his partner, Mr. Carscallen, and conceding all Mr. Carscallen swore to, there was no case against the defendants. There is no difference between law and equity as to the necessity for a contract under seal in the case of an executory contract: *Crampton v. Varna R. W. Co.*, L. R. 7 Ch. 562; *Houck v. Town of Whitby*, 14 Grant 671.

R. Martin, Q. C., contra. The evidence was improperly rejected. Interest was the ground on which such evidence was formerly rejected, and that is no longer a ground of objection: *Cobbett v. Hudson*, 1 E. & B. 11; *Taylor on Evidence*, 6th ed., p. 1206. Then as to the cause of action. The plaintiff had a claim against the defendants. The compromise of that claim, whether the claim was good or

bad, was a good consideration for a promise : *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. See further, *Sibtree v. Tripp*, 15 M. & W. 23 ; *Taunton v. Royal Insurance Co.*, 2 H. & M. 153. The objection that a corporation cannot be bound unless by an instrument under the corporate seal is applicable only to actions at law : *Brewster v. Canada Co.*, 4 Grant 443. The offer of the defendants' agent here was open till accepted or rejected : *Dunlop v. Higgins*, 1 H. L. 399, 401 ; *Dickinson v. Dodds*, Weekly Notes, 5th February, 1876. p. 46 ; and it is not necessary to accept within a reasonable time, unless the offer be for the sale of something of a fluctuating value : *Re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485, 498. Where a creditor demands and a debtor promises security for an existing debt, the forbearance to sue on the part of the creditor is a sufficient consideration to prevent the transaction from being a *nudum pactum* : *Alliance Bank v. Broom* 2 Drew. & Sm. 289, S. C. 10 Jur. N. S. 1121. See further, *Austin v. Gordon*, 32 U. C. R. 621 ; *Morton v. Burn*, 7 A. & E. 19, 25, 26. The enforcement of a parol promise to pay, in consideration of forbearance, is not open to the objection that it is seeking to vary by parol the terms of a sealed instrument : *Nash v. Armstrong*, 10 C. B. N. S. 259. Corporations are sometimes liable, although there be no contract under seal : *Clark v. Guardians of the Cuckfield Union*, 16 Jur. 686 ; *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617. To enforce an executory contract against a corporation, it might be necessary to shew that it was by deed ; but where the corporation have acted as upon an executed contract, it is presumed against them that everything has been done that was necessary to make it a binding contract between the parties : *Doe d. Pennington v. Tanriere*, 12 Q. B. 998, 1013. See also *Clark v. Guardians of the Cuckfield Union*, 16 Jur. 686 ; *Rex v. Inhabitants of Hagworthingham*, 3 D. & R. 16 ; *Henderson v. The Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409 ; *Australian Royal Mail Steam Navigation Co. v. Marzetti*

et al., 11 Ex. 228; *Sanders v. Guardians of St. Neot's Union*, 8 Q. B. 810; *Haigh v. Guardians of the North Bierley Union*, E. B. & E. 873; *Nicholson v. Guardians of the Bradfield Union*, L. R. 1 Q. B. 620. Defendants here, by their conduct, led plaintiff to believe that the condition as to suing within a year would not be insisted upon: *Powell v. Bannf*, 3 De G. J. & S. 318, 326; *Hughes v. Metropolitan R. W. Co.*, L. R. 1 C. P. D. 120. See further, *Taunton v. Royal Ins. Co.*, 2 H. & M., 135. A defence of the Statute of Limitations may be waived: *East India Co. v. Paul*, 14 Jur. 253, S. C. 7 Moore P. C. 85; *Lade v. Trill*, 6 Jur. 272; *Reed v. Fenn*, 35 L. J. Ch. 464, 5; *Wood v. Dwaris*, 11 Ex. 493. So may a condition like the present, which is in the nature of the Statute of Limitations: *Brady v. Western Assurance Co.*, 17 C. P. 597. The condition is not a reasonable one: 36 Vic. ch. 44, sec. 33, O. Even the provisions of an Act of Parliament may be waived: *Attorney-General of Victoria v. Ettershank*, L. R. 6 P. C. 354, 370. See also *Simpson v. Directors of the Westminster Palace Hotel Co.*, 8 H. L. 712, 717, 720. There is an equity created in favour of the plaintiff as against the right of the defendants to insist on the condition: *Grant v. Lexington Fire, Life, and Marine Ins. Co.* 5 Ind. 23, 31; *Ripley v. Aetna Ins. Co.*, 29 Barb. 552; *Mayor, &c., of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537, 548; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253, 266; *Penley v. Beacon Assurance Co.*, 7 Grant 130; *Canada Landed Credit Co. v. Canada Agricultural Insurance Co., Limited*, 17 Grant 418; *Patterson v. Royal Ins. Co.*, 14 Grant 169; *Delany v. Metropolitan Board of Works*, L. R. 3 C. P. 111. The year did not commence till the loss was ascertained, and the action was brought within one year from the ascertainment of the loss: *Mayor, &c., of New York v. Hamilton Fire Ins. Co.*, 39 N. Y. 45; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472, 484.

September 26, 1876. HARRISON, C. J.—The declaration in this case is of a mongrel description.

It partakes not only of the character of a declaration at law, but also of a bill in equity.

So far as it partakes of the character of a declaration at law, it in the first count relies for recovery upon the ground that the defendants, by their conduct, either prevented the plaintiff from complying with the condition as to bringing an action within the year next after the happening of the loss, or waived that condition, in either of which views the plaintiff, notwithstanding the existence of the condition, claims to sue on the policy. So far as the second count is concerned, it relies for recovery on an agreement for the payment of \$500 as a compromise of the plaintiff's claim, whether well or ill founded, at law or in equity.

So far as both counts of the declaration partake of the character of a bill in equity, they rely upon the conduct of the defendants in negotiating for a settlement until after the expiration of the year, as a suspension of the condition which requires the action to be brought within a year.

The many authorities cited by Mr. Martin, all of which I have examined, have a bearing more or less direct on some one or other of these contentions.

Before adverting to the different contentions in detail, it will be well to make some general observations with a view to the better understanding of Mr. Martin's exhaustive argument.

It is now undoubtedly in the power of the Court or Judge, before whom any question relating to a condition endorsed on a policy issued by a mutual fire insurance company is tried, to decide whether or not the particular condition is just and reasonable, and if held not to be just and reasonable, the condition is declared to be absolutely null and void: 36 Vic. ch. 44, sec. 33, O.

This is a power which will be sparingly exercised; for Courts generally, in the absence of fraud or other similar misconduct, shew little disposition to interfere with the contracts of parties. If the Courts were to act otherwise, they might be needlessly if not recklessly making contracts for parties who are themselves competent to contract.

The condition that an action or suit for the recovery of loss under a policy of insurance against fire, shall be brought within twelve months after the loss or damage, is not only expressly provided for by the Statute 36 Vic. ch. 44, sec. 54, but before the statute and without the aid of any statute was said to be a reasonable condition, and one which Courts of law and equity are equally bound to respect: See *Provincial Ins. Co. v. Ætna Ins. Co.*, 16 U. C. R. 135; *Hickey v. Anchor Ins. Co.*, 18 U. C. R. 433; *Ketchum v. Protective Ins. Co.*, 1 Allen N. B. 136; *Cray v. Hartford Fire Ins. Co.*, 1 Blatch. C. C. U. S. 280; *Wilson v. Ætna Ins. Co.*, 27 Verm. 99; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray 596; *Fullam v. New York Union Ins. Co.*, 7 Gray 61; *Brown v. Roger Williams Ins. Co.*, 5 Rh. I. 394; *Brown v. Hartford Ins. Co.*, 5 Ib. 394; *Brown v. Savannah Mutual Ins. Co.*, 24 Ga. 97; *North Western Ins. Co. v. Phoenix Oil and Candle Factory*, 31 Penn. St. 448; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa 287; *Peoria Marine and Fire Ins. Co. v. Whitehill* 25 Ill. 466; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 62; *Woodbury Savings Bank v. Charter-Oak*, 31 Conn. 517; *Roack v. New York Ins. Co.*, 30 N. Y. 546; *Kerrin v. Mutual Home Ins. Co.*, 7 Wall. 386.

Sometimes the condition is to the effect that the action shall be commenced within a certain number of months "after the adjustment of proofs," or "determination of the board of directors": *Williams v. Vermont Mutual Fire Ins. Co.*, 20 Verm. 222; *Dutton v. Vermont Mutual Fire Ins. Co.*, 17 Verm. 369; *Portage County Mutual Fire Ins. Co. v. West*, 6 Ohio St. 599; but is generally, as here, "after the happening of the loss or damage": 36 Vic. ch. 44, sec. 54.

The whole contract must however be read, and this condition if necessary read with others which may be held to control or affect it. Thus, if there be, besides a condition that no action is to be brought till sixty days after approval of the proof papers by the company, and the company delay for more than six months or a year, as the case may

be, to approve of the papers, and the fault is entirely that of the company, if the action be brought within sixty days, although beyond the limitation of six months or twelve months, as the case may be, the action will not be defeated: *Ames v. New York Ins. Co.*, 14 N. Y. 253; *The Mayor &c. of New York v. Hamilton Ins. Co.*, 10 Bos. 537, 39 N. Y. 45.

Where the delay to bring the action can be justly said to be the act of the company and not of the plaintiff, the company will not in any case be allowed to take advantage of its own wrong, and will be prevented from setting up the limitation clause to defeat the action or suit: *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

Mere negotiations for a settlement, in which no mention is made of the limitation clause, are not, in the absence of fraud on the part of the company, to defeat the right of the company to avail itself of a limitation condition: *Gooden v. Amoskeag Fire Ins. Co.*, 20 N. H. 73.

The condition is one designed for the benefit of the underwriters. It is therefore in the power of the underwriters, when the condition is merely endorsed on the policy, to waive the condition: *Ripley v. Aetna Ins. Co.*, 29 Barb. 552. See further *Reed v. Fenn*, 35 L. J. Ch. 464, 465; *Attorney-General of Victoria v. Ellershank*, L. R. 6 P. C. 354. But it is not in the power of any or every officer of the company by mere conduct to waive the conditions of any or every policy of insurance.

In *Merritt v. Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529, 532. Sir John B. Robinson said: "No authority has been cited for holding that where a public statute says an insurance shall be deemed and become void on failure of some stipulation inserted in the statute, such provision can be waived by consent of the parties, notice, consent, or verbal or tacit acquiescence. On principle we take it such a waiver cannot be relied on any more in a Court of equity than of law, for Courts of equity cannot dispense with what a public Act of Parliament expressly

requires. The King cannot do it, nor his Courts, we take it."

In *Lampkin v. Western Ins. Co.*, 13 U. C. R. 237, where the condition was as here, and the policy under seal, it was held that the president of the company had no power to waive the condition so as to bind the company.

But in *Brady v. Western Ins. Co. (Limited)*, 17 C. P. 597, where the policy was not under seal, it was held that the general manager of the company in Canada had power to do so.

In *Mason v. Hartford Fire Ins. Co.*, 37 U. C. R. 437, 442, it was held that an inspector of an insurance company had no power to waive the conditions in a policy, unless such as clearly fall within the power of the inspector's clear and acknowledged line of duty.

In *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418, it was held that an insurance company cannot set up in discharge of their liability, that the preliminary proofs were defective, where they did not make the objection to them when furnished, or until after a suit had been instituted for the loss.

But in *Stickney v. The Niagara District Mutual Ins. Co.*, 23 C. P. 372, 382, Hagarty, C. J., said: "It has been urged to us that where they (the company) receive them (the proof papers), and do not notify their objections to their sufficiency, they ought to be considered as waiving such objections, and a case was cited, *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418, where the language of one of the learned Vice-Chancellors seems to favour such a view. But in the report of the case none of the numerous cases in our common law Courts are noticed, and I do not feel at liberty to lay down any such rule, and must leave it to a Court of Error to declare if it be the law."

The Legislature of Ontario have since, to a great extent, declared the law on the point to be as held in the Court of Chancery. See 38 Vic. ch. 65, sec. 1, O.

The head note to *Brewster v. The Canada Co.*, 4 Grant

443, to the effect that "A corporation cannot be bound, unless by an instrument under the corporate seal, is applicable only to actions at law," is scarcely correct. No such point was determined in that case. All that the Chancellor said was, "I am inclined to think that under the particular provisions of their charter, the Canada Company may be legally bound by the contract of their commissioners, although no instrument has been executed under their corporate seal. But, in my opinion, this case does not involve the determination of that question." See p. 457.

In *Crampton v. The Varna R. W. Co.*, L. R. 7 Ch. 562, it was held that although the contractor was unable to sue at law, because the agreement was not under seal, he did not thereby gain an equity to enforce a claim for money. Lord Hatherley, in delivering judgment, said, p. 568: "The truth is, that every one who deals with corporations like these must be taken to know what are their powers of contracting, and must take a contract accordingly; and when there is only a money demand, and there is no valid contract, then this Court cannot interfere in the matter."

In *Houck v. The Town of Whitby*, 14 Grant 671, it was held that the defendants, a municipal corporation, in the absence of a contract under seal, were not liable to have a contract for the purchase of land enforced upon them. Mowat, V. C., in delivering judgment, said, p. 672: "The objection which seems to me fatal to the plaintiff's case is the want of the corporate seal. It was not contended on behalf of the plaintiff, that, in a case of this kind, the rule which requires a corporation to contract under seal was not as obligatory on this Court as on a Court of law. I have looked at the cases cited, some of which were cases at law and some were cases in equity, and I am clear that a seal was necessary to bind the corporation."

The general rule, both at law and in equity, is, that a corporation can only contract under seal. But wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, exceptions have prevailed.

Hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions: *Church v. The Imperial Gaslight and Coke Co.*, 6 A. & E. 846, 861; *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815, 822; *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91, 94; *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402, 409.

The general rule is, that an incorporated company cannot bind itself by a contract of insurance by parol: *Jones v. The Provincial Insurance Co.*, 16 U. C. R. 477.

One recognized exception in equity is, where money has been paid and an interim insurance granted by the agent of the company: *Penley v. Beacon Ass. Co.*, 7 Grant 130; *Patterson v. Royal Ins. Co.*, 14 Grant 169; *Wyld v. London and Liverpool and Globe Ins. Co.*, 23 Grant 442.

Where the contract of insurance has been made and executed, there ought to be no difference between Courts of law and equity either as to the interpretation or effect of the contract.

The right of the plaintiff under such a policy as the present is a limited right—that is, the right to sue, provided the suit be brought within twelve months after the loss or damage. The condition, which is a condition precedent, not only affects the remedy, but the right. If a defendant by his own default prevents the performance of a condition precedent to his liability, it may be held equivalent to performance in rendering liability absolute: *Leake on Contracts*, 351.

The plaintiff, in both counts of the declaration, alleges that he would have sued the defendants within a year next after the loss but for the hindrance and prevention of the defendants. He has, in my opinion, entirely failed to adduce any evidence in support of this allegation. There was nothing whatever to prevent the plaintiff issuing his writ of summons on the 19th of August, 1874, as he did on the 9th of December, 1874. The defendants never so much as requested him not to do so. There was no refer-

ence to the limitation clause in the correspondence. No doubt the defendants were desirous to avoid litigation, and the expense of litigation, but it would have added very little to the expense of litigation if the plaintiff had, as a matter of precaution, issued his writ even during the negotiations, conducted as they were without prejudice to the legal rights of either party.

It appears to me that all negotiations were at an end when the plaintiff or his attorney knew of the refusal of the defendants to entertain his offer of settlement on payment of \$2,400. The only offer which the secretary and treasurer admits to have made was to pay \$500. The plaintiff refused that offer, and in turn submitted an offer which the defendants refused. There was no offer of the defendants after that which the plaintiff was at liberty to accept, and certainly no offer which required five months to consider as to its acceptance. When the offer was made the defendants were liable to be sued. It would be absurd, in the absence of direct testimony, to hold that in a case where they suspected fraud and false swearing, they were continuing the offer after all liability to suit was at an end.

The case looks as if the plaintiff had by some inadvertence omitted to issue his writ in time, and having done so, was only too glad to accept \$500 rather than nothing. The omission on or before the 19th of August, 1874, to issue the writ was entirely the act of the plaintiff, an act for which the defendants were in no manner responsible. I agree with the learned Judge who tried the case, in holding that there was no hindrance or prevention on the part of the defendants.

Next as to the question of waiver. The language of Sir John B. Robinson, in *Merritt v. Niagara Mutual Ins. Co.*, 18 U. C. R. 529, 532, is against the possibility of waiver where the condition is one imposed by public Act of Parliament, or makes the penalty for non-performance the avoidance of the policy. I am not called upon to decide whether this language is applicable to such a condition as the one now before us, for I think there is no evidence whatever of waiver for submission to the jury.

In *Brady v. Western Ins. Co.*, 17 C. P. 597, there was a tender of money to the plaintiff after the expiration of the limitation as to time, and other circumstances which were consistent only with the idea of waiver of that condition. Here there was nothing of the kind. And this is for the present putting aside the difficulty as to the seal, and treating the policy as if not under seal. Had there during the negotiations been, as in *Hughes v. Metropolitan R. W. Co.*, L. R. 1 C. P. D. 120, any reference to the condition which indicated the setting it aside either temporarily or permanently, the plaintiff would have been in a different position. But without any approach to anything of the kind during the negotiations, and without any act on the part of the defendants, after the expiration of the time, from which an intention to waive can be inferred, it is impossible to do otherwise in point of law than rule as did the learned Judge at the trial, and decide that there is no evidence of waiver.

Then as to the agreement alleged in the second count. The contract sued upon in that count is executory. The defendants are a corporation. The rule, I take it, both at law and in equity, is, that a corporation is not liable to be sued for breach, or for enforcement of an executory contract, unless such contract be proved to be under seal of the corporation, or fall within one of the exceptions to the rule recognized either at law or in equity.

Mr. Martin, notwithstanding all his industry, was unable to cite any case to shew that this case is within any exception recognized either at law or in equity. The cases which he did cite where corporations are sued for work and labour, goods sold and delivered, &c., and held liable notwithstanding the want of a corporate seal, are obviously inapplicable.

But relinquishing the necessity of the seal, where is the evidence of an oral contract? The defendants deny the contract alleged. The onus is on the plaintiff to establish the contract. He calls two witnesses, one of whom states facts which, if true, shew there was no such contract, and

the other states facts which, if true, would lead to a weak inference of a contract.

If the evidence of Mr. Carscallen stood alone, I would not deem the evidence sufficient evidence of a contract. But, taking it in connection with that of Mr. Street, who was also called as a witness for the plaintiff, there is no room whatever for the inference of a contract. When the letter of 18th September, 1875, was written by Messrs. Martin & Carscallen, accepting the \$500, there was no offer to accept. The offer of \$500 their client had rejected on 20th April previously, and himself submitted an increased amount as an offer for the acceptance of the defendants. The board decided not to entertain the offer of the plaintiff to accept \$800 from the defendants. Mr. Street says, that shortly after the decision of the board the decision was communicated to the plaintiff's attorney, and that nothing afterwards, with a view to a settlement, took place from that time till the letter of 18th September, 1875. Mr. Carscallen does not agree in this statement of fact, but does not pretend that after 20th April, 1875, there were any negotiations on the part of the defendants. All negotiations had, whether we take the evidence of Mr. Street or Mr. Carscallen, ceased long before 18th August, 1874. The efforts on the part of the plaintiff after 18th August, 1874, to renew negotiations, were unsuccessful. If the question on the evidence had been submitted to the jury, as to whether there was such a contract as alleged, and the jury had found there was the contract, as a matter of fact, the Court would have felt bound to set the verdict aside. No rational verdict on such evidence could have been found for the plaintiff. In such a case it is, of course, proper to nonsuit: *Campbell et al. v. Hill*, 22 C. P. 526; S. C. 23 C. P. 473.

This disposes of so much of the claim as may be said to partake of the character of a declaration at law.

Then, as to the remedy, if any, of the plaintiff in equity. In my opinion it may be said that the demand advanced on the part of the plaintiff is "a purely money demand,"

so as to enable the plaintiff, if the claim be sustainable in equity, to sue for the same in a Court of law: Sec. 2 of 36 Vic. ch. 8, O.

But a plaintiff to succeed in equity must shew something more than that he cannot recover at law. He must shew facts which raise what is called "an equity." These may be adduced either in support of a claim for substantial relief, or to prevent a party taking an inequitable advantage at law.

The general principle in equity as well as at law is that a man must observe the engagements that he has thought fit to enter into; but there are special circumstances under which equity will grant relief where hitherto there was no remedy at law. See per Baggallay, J., in *Hughes v. The Metropolitan R. W. Co.*, L. R. 1 C. P. D. 120, 135.

Equity leans against forfeitures. Where there is any special circumstance, such as fraud, accident, mistake, or surprise, equity may relieve against forfeitures. The case last mentioned is a good illustration of this principle.

A lease of certain premises contained a covenant to repair upon giving six months notice, and a condition of re-entry. The defendants became sub-lessees under a deed containing a similar covenant. The premises being out of repair the plaintiff, who was a reversioner, gave notice to the defendants on the 22nd of October, 1874, to repair within six months. The defendants wrote to the plaintiff suggesting that he should purchase their interest, and stating that he should postpone the repairs until he heard from them on the subject. Negotiations then took place on this footing. On the 31st of December, 1874, the defendants wrote to the plaintiff stating their price. Plaintiff declined the offer at the price, but asked defendants to reconsider the question of price, and make "a modified proposal." No further proposal was made. On the 13th of April, 1875, the plaintiff wrote to the defendants' lessor stating that the six months would expire on the 21st inst. The defendants thereupon commenced to repair the premises. The plaintiff notwithstanding brought his action of ejectment, and

recovered judgment on the ground of forfeiture. The Court of Appeal (reversing the decision of the Common Pleas division) held that the true construction of what had taken place was that the notice to repair was suspended during the negotiations: that the negotiations were not broken off by the plaintiff on the 31st of December, and that the plaintiff by his conduct had misled the defendants into supposing that the notice to repair was still suspended, and that under the circumstances it was inequitable to permit him to take advantage of the forfeiture.

If a person make a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the person making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration may affect the course of conduct which may be pursued by the person to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of these circumstances; and a Court of equity will not hold the party to whom the representation is made bound, unless such a communication has been made: Per Lord Justice Turner in *Tract v. Baring*, 4 DeG. J. & S. 318, 329. See also *Kerr on Fraud and Mistake*, 33.

Had the plaintiff stipulated that during the negotiations the twelve months clause should be suspended; had the defendants not only refused to entertain the plaintiff's offer of \$800, but, during the suspension of the limitation clause asked him to make a modified offer, this case and the case of *Hughes v. The Metropolitan R. W. Co.*, L. R. 1 C. P. D., 120 would be nearly parallel.

But unfortunately for the plaintiff, the parallel fails at two essential points:—

1. There was no stipulation whatever for the suspension of the twelve months clause.

2. There was no request from the defendants to the

plaintiff, after the rejection of the \$800 offer, for a modified offer.

We have, instead, the fact of negotiations for a settlement without any reference to the limitation clause, and the further fact that these negotiations terminated, to the knowledge of the plaintiff, in sufficient time to have enabled the plaintiff, if sufficiently alive to the tenor of his contract, to have commenced his action within the year next after the loss.

These facts do not shew any right on the part of the plaintiff, either at law or in equity, to prevent the defendants availing themselves of the limitation clause: See *Gooden v. Amoskeag Fire Ins. Co.*, 20 N. H. 73.

In the last mentioned case there was language used by Chief Justice Gilchrist, in delivering the judgment of the Supreme Court of New Hampshire, which is applicable to this case.

The learned Chief Justice said, p. 76: "All that is attempted to be done by the plaintiff in this particular is to shew that at various times there were negotiations between the parties with a view of referring to arbitrators the matter in dispute between them. It does not, however, appear that they ever expressly agreed to suspend legal remedies, to await the issue of these negotiations; and no such agreement is necessarily involved or implied in these negotiations, because they interposed no obstruction whatever to bringing the suit. This is not a case in which the operation of the Statute of Limitations is delayed by the fraud of the defendant in concealing the cause of action, nor is it analogous to such a case. Nor do the defendants appear to have done anything to mislead the plaintiff. That party appears to have trusted to the result of the negotiations in which he was engaged, too long, and until his right to legal remedies has been lost by the remediless lapse of time."

The only remaining question for decision is, as to the rejection of the testimony of the senior counsel for the plaintiff offered at the trial.

The presiding Judge may control the conduct of counsel, but has no right to reject his testimony when tendered as a witness, if a competent witness.

The question is not one of propriety, but of legal right—that is, whether, in the present state of the law, counsel for either party to a suit is a competent witness for his client.

In the case of *Sir Thomas More*, 1 How. St. Tr. 386, 390, the then Solicitor-General, who was conducting the prosecution, in the language of Lord Campbell, “to his eternal disgrace and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar and presented himself as a witness for the Crown”: *1 Campbell's Lives of the Chancellors*, 436, 2nd ed., (1847.)

In *Rex v. Brice*, 2 B. & Al. 606, it was said, *per Curiam*, that “In a criminal prosecution, instituted for the interests of the public, in the name of the King, and not to gratify the objects of an individual, a prosecutor has no right to address the jury. Counsel indeed, (who are in some measure under the control of the Court) have this privilege allowed to them; because, from their professional education and habits of business, it is to be expected that they will not state to the jury anything but what is fit for them to hear. Besides, the prosecutor may be, and generally is, a witness; and it is very *unfit* that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath.”

Bayley, J., added that he remembered a case “where Lord Ellenborough had allowed the prosecutor to address the jury, and afterwards, on being spoken to on the subject by the other Judges, expressed his conviction that he had done wrong.”

It is mentioned in a note to the last case that *Rex v. Milne et al.*, in which the prosecutor, who had been a witness before the grand jury, waived giving evidence in the case before Lord Ellenborough would allow him to address the jury, is probably the case referred to by Bayley, J.

The first civil case of which we have a satisfactory report wherein the point was raised was *Stones v. Byron*, 4 D. & L. 393, also reported in 7 L. T. 197, under the name of *Stones v. Bacon*.

The trial took place before the under-sheriff of Middlesex. The attorney for the plaintiff made a speech as advocate for the plaintiff, examined the witnesses for the plaintiff, addressed the jury in reply to the defendant's counsel, and was afterwards allowed to call himself as a witness for the plaintiff.

Patteson, J., made the rule absolute for a new trial, saying, p. 395: "I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and, having been received, that there ought to be a new trial."

In *Deane v. Packwood*, mentioned in a note to *Stones v. Byron*, 4 D. & L. 393, and reported as *Dunn v. Packwood*, in 8 L. T. 371, and in 11 Jur. 242, which was also a trial before an under-sheriff, Erle, J., on the authority of *Stones v. Byron*, made the rule absolute for a new trial, "on the ground that the plaintiff's attorney acted both as an advocate and a witness," which the learned Judge said was "a very objectionable proceeding."

It will be observed, as mentioned by Mr. Best, in his work on Evidence, 6th ed., sec. 184, that both these cases are the decisions of single Judges, whose language falls short of laying down as an universal rule, that under no circumstances whatever can counsel be examined as a witness in a case in which he is acting as such.

In *Shields v. McGrath et al.*, 3 Kerr 398, the Supreme Court of New Brunswick, following *Stones v. Byron*, 4 D. & L. 393, made absolute a rule for a new trial, where one of the defendants' counsel after having been examined as a witness was permitted to address the jury.

Chipman, C. J., in delivering judgment said, p. 398: "We think, for the sake of precedent, there ought to be a new trial, on the ground of the defendants' counsel being examined

as a witness in their behalf. We impute no improper motives to the learned counsel who was so examined, but we think it an improper practice, and that the rule for a new trial should be made absolute."

The point was, I find, according to reported cases, at least twice before the Court in which I now preside.

In *Benedict v. Boulton et al.*, 4 U. C. R. 96, at the close of the plaintiff's case the defendants' counsel objected that no evidence had been given to shew that one of the defendants was any party to the contract. The plaintiff's attorney, who acted in the double capacity of counsel and witness, then urged the Chief Justice, who tried the cause, to allow him to supply the proof by stating conversations with them, but this was declined and the plaintiff nonsuited."

Sir John B. Robinson, the then Chief Justice of the Court, delivered judgment, discharging the rule on the ground that it was in the discretion of the presiding Judge at the trial to refuse to allow evidence to be supplied under the circumstances, but added, at p. 97, adverting to *Stones v. Bacon* and *Dunn v. Packwood*, then recently decided in England, "if there was anything wrong here it was in receiving the evidence of the plaintiff's attorney to any extent * * * It will, I am persuaded, be much for the advantage of the profession to follow the same course here."

In *Cameron v. Forsyth et al.*, 4 U. C. R. 189, where a counsel, upon stating to a jury facts which he himself could prove, was reminded by the presiding Judge that he could not act both as an advocate and a witness, immediately sat down, ceased to act as counsel, and was permitted to give evidence in the cause on an assessment of damages, the Court refused to set aside the assessment, saying it would be "enforcing the rule in too rigid a spirit, while notice of it may be supposed not to have reached all the profession, to set aside the assessment under the circumstances."

In *Cobbett v. Hudson*, 1 E. & B. 11, which is now the leading case on the point, where a party to a suit,

conducting his own cause at the trial, claimed the right to address the jury as an advocate and to give evidence on his own behalf as a witness, but the Lord Chief Justice (Campbell) told him that if he addressed the jury as an advocate he could not be permitted to give evidence as a witness, and on this ruling the plaintiff elected to act as an advocate, and not as a witness, and lost the verdict, but the verdict was set aside.

The learned Judge who tried the cause, and who made the severe remarks to which I have already referred in *Sir Thomas Moore's Case*, in delivering judgment, said, p. 12: "We are fully aware of the inconvenient consequences which must follow from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the Judge at *Nisi Prius* has at present sufficient authority to prevent it. * * We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy or expediency, with respect to which different Judges may form different opinions."

The learned Chief Justice (Campbell) then reviews all the cases, and, after doing so, makes use of the following observations, at p. 14: "We may hope that, without any positive rule against a party addressing the jury and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. * * If the practice does gain ground to a degree seriously injurious to the due administration of justice, the Legislature may interfere, or the Judges, under the authority vested in them, may make a general order whereby it may be prevented in future. But, as the law now stands, we think the Judge at *Nisi Prius* exceeded his authority in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both if he shall be so inclined."

The fact that the case was one of plaintiff in person acting as his own advocate, and seeking to act as a witness, makes no difference in the application of the rule. The rule applied to him is one which must be applied to any advocate, whether acting for himself or another person.

The rule in the United States is now in accordance with that laid down in *Cobbett v. Hudson*, 1 E. & B. 11. See *Read v. Colcock*, 1 Nott & McCord 592; *Newman v. Bradley*, 1 Dallas 240; *Miles v. O'Hara*, 1 Serg. & R. 32; *Boulden v. Hebel*, 17 Serg. & R. 312; *McGehee v. Hansall*, 13 Ala. 17; *Potter v. Inhabitants of Ware*, 1 Cush. 519. But it is a rule which is much discouraged: *The State v. Woodside*, 9 Iredell 496.

The latest reported case which I have seen is *Bank of British North America v. McElroy*, 2 Pugsley N. B. 462, where the Judge at the trial refused to permit the defendant's counsel to be both counsel and witness, and there was a verdict for the plaintiff. The Supreme Court, following *Cobbett v. Hudson*, and overruling *Shields v. McGrath et al.*, 3 Kerr 398, made the rule absolute for a new trial.

Ritchie, C. J., then of the Supreme Court of New Brunswick, but now a Judge of the Supreme Court of Canada, in delivering judgment said, at p. 463: "It is the privilege of the party to offer the counsel as a witness; but that it is an indecent proceeding, and should be discouraged, no one can deny. I have always discountenanced the practice, and think the circumstances must be very exceptional to warrant counsel in offering their evidence. * * I feel reluctantly constrained to say, that in my opinion there should be a new trial."

While I think it very desirable in the administration of justice that the characters of an advocate and a witness should, if possible, be kept separate, I apprehend that in the present state of the law it is misdirection for a Judge to reject the testimony of counsel when offered as a witness on behalf of his client. But a new trial is not to

be granted on the ground of misdirection, or of an improper admission or reception of evidence, unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned on the trial of the action: *Smith v. Murphy*, 35 U. C. R. 569; 37 Vic. ch. 7, sec. 34, O. I am not of that opinion in this case. The evidence tendered was to corroborate the testimony of Mr. Carscallen previously received. Assuming Mr. Carscallen's evidence to be corroborated to the fullest extent, I am of opinion that the plaintiff is not entitled to recover, for reasons already given. No substantial wrong has therefore been occasioned to the plaintiff by the rejection of the evidence.

I am not surprised that the learned Judge who tried the case hesitated to permit the two counsel for the plaintiff in this case to be his two principal witnesses. Without doubt the necessity for their being witnesses was sprung upon them at the trial. Whenever counsel foresee or can foresee the probability of their being required as witnesses, it is much better that other counsel should be retained.

The administration of justice should not only be pure, but kept so pure as to be free from all suspicion of being tainted. Counsel and witnesses, as well as a Judge, are essential to its proper administration. The functions of each are so entirely distinct that they should be kept completely apart.

The Judge in this Province presides, and where there is a jury directs the jury as to the law; and where there is no jury, is himself both Judge and jury. Counsel before the Judge and jury zealously argue the side of their clients. But whether their clients shall succeed or fail ought to depend on the testimony of persons sworn impartially to tell the truth. Counsel cannot be unbiassed witnesses, and if permitted without check to be witnesses there would be not only the revolting indecency of the proceeding, but the possible difficulty of the jury being unable to distinguish between what the counsel said as an advocate and what he said as a witness.

The remedy at present is, however, in the hands of the Bar. Although the right of being both counsel and witness exists the right is seldom invoked and never abused. We may therefore, I think, safely continue to leave the honour of the Bar in the keeping of the learned and able Bar of this Province.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

HUTCHINSON V. NIAGARA DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Statement of loss—Party to sue—Property insured.

A policy was effected in the name of H. & D., then partners. After the fire, and two months after the making and delivery of the statement of loss, D. assigned all his interest in the policy to H.

Held, that the action was properly brought, and the statement of loss made, by H. alone.

Held, also, that the statement of loss, set out in the case, and sworn to by the plaintiff only, was sufficient.

The statement was required by the condition to be given within thirty days. The fire was on the 11th August, and the statement was not sent until the 25th September, but the delay was occasioned by the delay of the company's agent to send a blank form for the purpose, as he had promised: *Held*, sufficient.

Seemle, that at all events the delay of a few days would not, under the condition, avoid the policy.

Paper bags for flour burned in the mill, were held not to be covered by a policy upon tools.

THIS was an action on a fire policy.

Pleas: 1. *Non est factum*.

2. Setting out a condition endorsed on the policy, "that all persons insured with this company and sustaining loss or damage by fire are forthwith to give notice thereof to the company, and within thirty days after said loss to deliver in a particular and detailed account of such loss, or damage, signed by their own hand, and verified by their oath

or affirmation, and by their books of account, and other proper vouchers. They shall also declare on oath whether any and what other insurance or incumbrances has been made on the same property. If there be any misrepresentation, fraud, or false swearing, the claimant shall forfeit all claims by virtue of his policy." Averment, that the plaintiff did not forthwith give notice, &c., and within thirty days after the said loss deliver in a particular and detailed account of such loss or damage, signed by his hand, and verified by his oath or affirmation, &c., and did not declare on oath whether any and what other insurance had been made—whereby the policy became void.

3. That the plaintiff did make a false statement on oath, &c., and did falsely and maliciously swear, &c., that the loss sustained amounted to \$1,054.80, whereas the plaintiff did not lose goods to any such amount, &c.; and that he was guilty of fraud and false swearing, within the meaning of the condition mentioned in the third plea.

4. That the goods were not destroyed by fire.

5. That the policy was made to a firm of the name of Hutchinson & Dodge, and that no assignment was ever made to the plaintiff of their interest, &c.

6. That the plaintiff at the time of the fire was not interested in the goods.

7. That after the making of the policy, Dodge transferred his interest in the property insured to the plaintiff, and although thirty days elapsed before the loss neither Dodge nor the plaintiff gave defendants, &c., any notice in writing of the transfer, or obtained the consent of the defendants thereto; and so the policy was void.

Issue was taken on all the pleas.

The cause was tried before Galt, J., without a jury, at the last Cornwall Spring Assizes, when a verdict was entered for the plaintiff for \$812, leave being reserved to the defendants to move to reduce the verdict by \$120, being the value of certain paper flour sacks destroyed.

The facts are stated in the judgment.

In Easter term May 17, 1876, *F. Osler* obtained a rule to set aside the verdict, and to enter a nonsuit, on the ground that the plaintiff did not comply with the condition 46 endorsed on the policy, and of section 52 of 36 Vic. ch. 44, O.: that the plaintiff did not furnish his statement and proof of loss; and on the ground that one Dodge named in the policy should have been a party plaintiff, and should have joined with the plaintiff in the statement and proof of loss, and to reduce the verdict by \$120, the value of the paper bags.

During this term, August 30, 1876, *M. C. Cameron*, Q. C., shewed cause. The defendants were solely to blame for the non-receipt of the statements within the thirty days, for their agent prevented the plaintiff sending them in in time, by stating that he would furnish the plaintiff with printed forms to use, which he did not do. The statements sent in by the plaintiff were otherwise correct. This objection is not tenable: 38 Vic. ch. 65 sec. 52, C. The objection that Dodge should have been made a plaintiff, was given up at the trial. There is nothing in the objection that the proof of loss should have been sworn by plaintiff and Dodge.

Osler supported his rule. The statute does not apply, and the objection as to the statement is well taken: *Greaves v. Niagara District Mutual Fire Ins. Co.*, 25 C. P. 127; *Stickney v. Niagara District Mutual Fire Ins. Co.*, 23 C. P. 372; *Mulvey v. Gore District Mutual Ass. Co.*, *Ib.* 424; *Scott v. Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 119.

September 26, 1876. MORRISON, J.—I am of opinion that so much of the rule which asks for a nonsuit should be discharged.

The plaintiff and one Dodge effected an insurance on the property in question, to the amount of \$800, viz., on grain, flour, and fixtures, consisting of working tools. On the 11th of August, the mill in which the property was burned, and the property therein destroyed. On the 25th September the plaintiff sent to the defendants a statement

of the loss, sworn to by the plaintiff, and verified by the oath of a person who was employed in the mill. The statement contained a detailed account of all the property burnt, viz., all property within the terms of the policy, and other property.

At the trial the defendants contended that the statement of loss was insufficient. It seems to me the objection is untenable. The alleged statement set out every article in detail, with the alleged value opposite. There were seven different items, in all amounting to \$237, which it was contended were not within the terms of the policy; but, assuming every one of these articles to be excluded, there remained items to the alleged amount of \$815 covered by the policy, and for such articles the learned Judge allowed about \$690.

It was further objected that the statement was not furnished within thirty days. If there was anything in the objection, I think from the evidence the delay was occasioned by the agent of the company promising the plaintiff that a blank form for the statements would be sent to him for that purpose, which was never sent, and in that way occurred the delay. The mere fact of the statement being sent in a few days after the thirty days elapsed, does not under the condition void the policy, or defeat the plaintiff's claim.

As Pollock, C. B., said, in giving judgment in *Mason v. Harvey*, 8 Ex. 819, 821, where the time limited was three months: "The condition is not to be construed with such strictness. Its meaning is, that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss.

As to the objection taken in the rule, that Dodge, who was one of the assured, should have been a party plaintiff and should have joined with the plaintiff in his statement of loss, the policy was in the joint names of the plaintiff and Dodge, who were partners in business. After the fire, and two months after the making and delivery of the

statement of loss, Dodge assigned all his interest, &c., in the policy to the plaintiff; and at the trial it appears, by the learned Judge's notes, that the objection was very properly given up by the defendant's counsel.

I see nothing in the point that the claim papers were only sworn to by the one partner, the plaintiff, they being otherwise sufficient.

As to that part of the rule which asks to reduce the verdict by \$120, the value of certain paper bags, we think the defendants are entitled to succeed, as we do not think they were covered by the policy. The rule will therefore go, discharging so much as asks to enter a nonsuit, and be absolute to reduce the verdict by \$120.

HARRISON, C. J., and WILSON, J., concurred.

Rule accordingly.

BALL V. PARKER.

Statute of Limitations—Part payment—Acknowledgment.

The plaintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by the statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them the plaintiff told him or his clerk that he had credited it against his, the plaintiff's, account, to which defendant assented. In 1875 the plaintiff wrote to defendant sending his account and asking for payment, and stating that he had credited defendant's account rendered. The defendant's clerk answered repudiating the claim.

Held, 1. That there was no evidence of any payment on account to take the case out of the statute, there being no act on *defendant's part* amounting to payment; and, 2. That the letter if it had contained any acknowledgment would have been inoperative, not being signed by defendant himself.

THIS was an action brought, on 6th January, 1876, by the plaintiff, an attorney and solicitor, for work, journeys, and attendance by him as an attorney and solicitor for the defendant.

Pleas: 1. Never indebted; 2. Payment; 3. Statute of Limitations; 4. Set-off.

Issue.

The cause was tried at the last Spring Assizes for the county of Oxford, before Patterson, J.A., without a jury.

The defendant was sued in the Court of Queen's Bench by one Hatch. Plaintiff was his attorney in that suit. The plaintiff received instructions for the defence in February, 1866. The record was four times entered for trial; once it was a remanet. There were three verdicts for the defendant. Judgment was finally entered for the defendant, in August, 1868, for \$463.40, costs taxed to the defendant, including witness fees. Writs of execution were issued therefor, but nothing was made. All of the services, with some small exceptions not necessary to be mentioned, were rendered before 1870, and more than six years before the commencement of the present action.

Defendant was in the pork and grain business in Woodstock. Plaintiff had dealings with him. On 18th March,

1872, defendant rendered to the plaintiff an account amounting to \$24.55 for peas and oats previously sold by the defendant to the plaintiff. The plaintiff afterwards credited this amount to the defendant in his, the plaintiff's, books. The plaintiff swore that he got the peas and oats to apply on the account, and so told the defendant or his clerk; but both the defendant and his clerk denied this statement, and represented that the goods were sold to the plaintiff in the ordinary course; that the plaintiff had other dealings with the defendant, sometimes paying and sometimes not paying at the time he purchased goods.

The plaintiff, on the 22nd May, 1875, wrote to defendant as follows:

“WOODSTOCK, ONT., May 22, 1875.

“HENRY PARKER, Esq., Woodstock.

Dear Sir,—

“As I must have all my old matters closed, I send you an account as appears in my books. The taxed costs in *Hatch v. Parker* amount to \$463.40, and I have credited you paid witnesses \$104.50, and paid for juries \$108. *I have also credited account rendered \$24.55.* Any amount since that date must be deducted from my account. As I am very much in want of money, and the account has now been standing over five years, I trust you will close it without delay, &c.

Yours truly,

FRANCIS R. BALL.”

The following reply, written by Mr. Hill, a clerk of the defendant, was also put in evidence:

“WOODSTOCK, August 4, 1875.

“F. R. BALL, Esq.

Dear Sir,—

In answer to your letter claiming that I owe you an account, I beg to say that I have your account in detail settled and receipted for all work done for me in your office for the past nine years, and that the only unsettled matter I have any knowledge of is the old matter of the Hatch estate, which you most distinctly told me years ago, when urging you to close the matter up, that you would never ask me for any fees in the case, as you could make it out of the estate, and that if you could wait for your fees until it was made out of the party Hatch, surely I could; and

as you know that I have never troubled you about the matter since, which is nine or ten years ago, and that you must be in error about cash out, as I paid all the disbursements in cash during the progress of the trials. Trusting that you may be able to make your account out of the parties against whom you got judgment in the case, as well as the advances made by me in cash, *and supplies charged to you since in my books,*

I remain, yours truly,

H. PARKER, per H."

Counsel for the defendant moved for a nonsuit, on the ground that, without an express arrangement that the account should be set off, the plaintiff's claim was barred.

The learned Judge refused to nonsuit, and found that the plaintiff ordered the goods charged for in the account of \$24.55 without any understanding at the time that they were to go on account: that after the account was rendered the plaintiff told either the defendant or his clerk that he had credited it in his, plaintiff's, account against the defendant: that the plaintiff did so credit it: that this was not admitted by the defendant or his clerk, but all the subsequent dealing was entirely consistent with the letter of 4th August, 1875, written by the authority of defendant by the clerk in question; and that the defendant, in 1872, assented to the application of the \$24.55 as a payment on the plaintiff's account.

The learned Judge therefore, after deducting the \$24.55 and some other credits, found a verdict for plaintiff for \$331.53, allowing interest from 27th November, 1875, \$6.61, making in all \$338.14, for which he found a verdict for the plaintiff.

During Easter Term, May 19, 1876, *M. C. Cameron*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict or a nonsuit entered, pursuant to the Law Reform Act, on the ground that the verdict was contrary to law and evidence.

During this term, August 31, 1876, *F. Osler* shewed cause. The verdict was justified by the evidence and good in law:

Baildon v. Walton, 1 Ex. 617; *Hooper v. Stevens*, 4 A. & E. 71; *Hart v. Nash*, 2 C. M. & R. 337; *Walker v. Butler*, 6 E. & B. 506.

M. C. Cameron, Q.C., contra. What took place between the parties did not amount to payment so as to take the case out of the statute, and there was no sufficient acknowledgment in writing for that purpose: *Waugh v. Cope*, 6 M & W. 824; *Routledge v. Ramsay*, 8 A. & E. 221; *Willis v. Newham*, 3 Y. & J. 518; *Cushman v. Turner*, L. R. 1 Q. B. 500.

September 26, 1876, HARRISON, C. J.—I propose to deal with this case on the facts as found by the learned Judge.

The question of law which arises on these facts is, whether there was sufficient payment or acknowledgment of the debt sued for within six years next before action to take the case out of the operation of the Statute of Limitations.

Since the passing of Consol. Stat. U. C. ch. 44 (which is the same as 9 Geo. IV. ch. 14, commonly called Lord Tenterden's Act in England), nothing after the lapse of six years will revive the debt except part payment or an acknowledgment in writing signed by the party chargeable thereby.

The learned Judge finds that the plaintiff ordered the goods without any agreement at the time that they were to go on account, and that after the account was rendered plaintiff told either defendant or his clerk that he credited it on account, and that he did so credit it.

It is to be observed that, so far as the finding goes, it shews no act on the part of the defendant amounting to part payment. The act of the plaintiff in afterwards crediting the amount is not the act of the defendant, and should not, *per se*, have any binding effect on the defendant.

Part payment must be an act of the debtor, and is an acknowledgment by him of an existing debt, and from this acknowledgment the law infers a promise to pay the residue: *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

It is true the part payment need not be in money. Any transaction between the parties which, by mutual agreement, is intended to have that effect will be held to have the actual effect of payment in money: *Maber v. Maber*, L. R. 2 Ex. 153. But in this case it is not found that when the goods were delivered by defendant to plaintiff they were delivered upon any agreement that they should be received in part payment of the plaintiff's account; and I do not think that the subsequent assent of the defendant, as found by the learned Judge, is, under the circumstances, equivalent to such an agreement for the purpose of taking the case out of the Statute of Limitations: *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens et al.*, 4 A. & E. 71.

The mere fact of part payment is not of itself conclusive to take a case out of the Statute of Limitations.

In order to take a case out of the statute by a part payment, it must appear, in the first place, that the payment was made on account of the debt; secondly, it must appear that the payment was on account of the debt for which the action was brought; and, in the third place, it must appear that the payment was made under such circumstances as to warrant a jury in inferring a promise to pay the residue: *Holme v. Green*, 1 Stark. 488; *Tippetts v. Heane*, 1 C. M. & R. 252; *Wainman v. Kynman*, 1 Ex. 118; *Burkitt v. Blanchard*, 3 Ex. 89. See also *Baildon v. Walton*, 1 Ex. 617; *Worthington v. Grimsditch*, 7 Q. B. 479; *Burn v. Boulton*, 2 C. B. 476.

The learned Judge has not expressly found as a fact that there was any payment, and he certainly has not found a payment under such circumstances as to warrant the inference necessary to take the case out of the Statute of Limitations.

Plaintiff, however, insists upon defendant's letter of 4th August, 1875, taken in connection with plaintiff's letter of 4th May, 1875, as a sufficient acknowledgment in writing of the debt to take the case out of the Statute of Limitations.

The case of *Waugh v. Cope*, 6 M. & W. 824, is, I think, in point against the plaintiff on this contention.

The plaintiff in that case was, as here, an attorney, and had performed professional services of various kinds for the defendant in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy enquiry in which the plaintiff was concerned as a solicitor, the plaintiff wrote to him to know what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, *and place the same to his (defendant's) account*. In March, 1833, the plaintiff wrote to the defendant informing him that the sums allowed were £2 2s. and 10s. 6d., enclosing receipts for those sums for the defendant's signature, and concluding: "*I will give you credit for the sums on my accounts against you, agreeably to your note of the 21st July last.*" The defendant returned the receipts signed by him, and the £2 2s. and 10s. 6d. were paid to the plaintiff on production of these receipts. In 1833, the plaintiff delivered to the defendant a bill of costs amounting to £289, the first item being in 1827 and the two last in 1830 and 1831. In an action on this bill, commenced in January, 1839, it was held that the letters given in evidence did not sufficiently shew that the £2 2s. and 10s. 6d. were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations.

Lord Abinger, in delivering judgment, said p. 829: "It does not satisfactorily appear, from the letters given in evidence in this case, that the defendant admitted there was any existing account against him, more than the sum he was paying: all that he admits is, that the money, when received, is to be applied in discharge of the account which the plaintiff had against him; but there is no distinct admission that that was an existing debt of which that was a payment in part."

In the case now before us, the defendant, in the letter of 4th August, 1875, so far from in any manner admitting an existing debt for any amount beyond the sums paid or

supplies charged, expressly repudiates the debt, saying to the plaintiff: "You most distinctly told me, years ago, when urging you to close the matter up, that you would never ask me for any fees in the case, as you could make it out of the estate." See *Linsell v. Bonsor*, 2 Bing. N. C. 241.

It is impossible, with these authorities before us, to hold that the letter of 4th August, 1875, even if signed by the defendant himself, contains any acknowledgment in writing by the defendant so as, under the operation of section 2 of Consol. Stat. U. C. ch. 44, to take the case out of the Statute of Limitations.

The fact that the letter of 4th August, 1875, is not signed by the defendant himself, but by one of his clerks, is an insuperable objection to it as an acknowledgment under the statute. No such acknowledgment is sufficient "unless signed by the party chargeable thereby:" Consol. Stat. U. C. ch. 44, sec. 2. Signature by an agent is insufficient for the purposes of the Act: *Hyde et al. v. Johnson*, 2 Bing. N. C. 776; *Clark v. Alexander*, 8 Scott N. R. 147; *Williams v. Mason*, 28 L. T. N. S. 232; *Swift v. Jewsbury*, L. R. 9 Q. B. 301.

The letter of defendant of 4th August, 1875, is not signed by the defendant, but by one of his clerks, who wrote the same and wrote the defendant's name thereto. In *Hyde v. Johnson*, 2 Bing. N. C. 776, the letter was written by the wife in the name of the husband and at his request, and was held not sufficient. This decision has been upheld and followed in the subsequent cases to which I have already referred.

The authorities, we think, compel us to make the rule absolute to enter a nonsuit.

MORRISON, J., and WILSON, J., concurred.

Rule absolute (a).

(a) This case has been argued in Appeal, and stands for judgment.

BOYS V. WOOD ET AL.

Statute of Limitations.

In ejectment it appeared that William Wood, Jr., owning the land in question, left it in 1852 in possession of his father, the defendant; and that in 1859 he, in the presence and with the consent and approval of his father, mortgaged it to R., through whom the plaintiff claimed. *Held*, that defendant could not, as against the plaintiff, set up any title founded on his possession before the execution of the mortgage.

EJECTMENT, for the recovery of possession of the east fifty acres of broken lot number one, in the seventh concession of the township of Orillia, Southern Division, in the County of Simcoe.

The writ of ejectment was issued on 6th April, 1875.

Judgment was signed by default against the defendant William Wood, the younger.

William Wood, the elder, appeared and defended the action, which was tried at the last Fall Assizes, for the county of Simcoe, before Galt, J., without a jury.

The plaintiff claimed title under a deed from David Morrow, who sold and conveyed the land to the plaintiff, under a power of sale contained in a certain mortgage made by William Wood, the younger, to William Root, dated January, 1859, which, after some mesne assignments, became the property of David Morrow.

The defendant William Wood, the elder, besides denying the plaintiff's title, claimed title in himself by length of possession.

The land in question was, on 29th July, 1833, granted by the Crown to Edward O'Brien.

Edward O'Brien, by deed, dated 8th December, 1855, conveyed the land to William Wood, the younger.

William Wood, the younger, by deed, dated 13th January, 1859, conveyed the land to William Root, subject to a proviso for redemption on payment of \$800 in twelve months from date, with interest at 12 per cent. per annum till paid, the first payment of interest to be made on 12th July, 1859.

This mortgage, which contained a power of sale on default, by various mesne assignments, became vested in David Morrow, who by deed, dated 5th April, 1875, conveyed the land to plaintiff.

This closed the plaintiff's case.

William Wood, the elder, was called as a witness for the defence. He proved he had been living on the land for 32 years: that the land had been let out for grazing: that he received the money for grazing: that he never paid any interest on the mortgage: that his son left the property in 1852, and never afterwards returned to it.

William Wood, the younger, was also called as a witness for the defence. He testified that he left the land in 1852, leaving his father and mother in possession, and that they had been in possession ever since: that the land belonged to him, witness: that he executed the mortgage to Root: that his father was present when the mortgage was executed: that his father did not pretend at the time to have any title to the land, and negotiated for the loan on behalf of witness, and that witness from time to time paid the taxes on the land.

David Morrow was called in reply. He proved that at the time he held a prior mortgage on the land executed by William Wood, the younger: that the mortgage of 13th January, 1859, was given in renewal of the prior mortgage, dated 27th February, 1857, and for additional advances: that the prior mortgage was destroyed when the existing mortgage was executed: that the prior mortgage was to himself, and the existing mortgage to his son-in-law Root: that it was taken in the name of Root in order that Morrow "might witness it."

Several letters written by William Wood, the elder, to David Morrow during the negotiations for the mortgaged deed, representing William Wood, the younger, to be the owner of the land, were also proved by David Morrow, and put in as evidence by the plaintiff.

It is unnecessary, as nothing turns upon them, to set them forth here.

The learned Judge found that William Wood, the younger, was the owner of the land : that in 1852, he left the land in the possession of William Wood, the elder : that although he had been occasionally on the land since it was for the purpose of calling on his father and mother, and not to reside on the land : that in 1857, David Morrow, through whom the plaintiff claims, held a mortgage on the land : that in 1859, the present mortgage was executed by William Wood, the younger, in the presence, and with the consent and approbation of the defendant William Wood, the elder : that the letters written by William Wood, the elder, to David Morrow, constituted a sufficient acknowledgment of the title of William Wood, the younger, to prevent the defendant from setting up a title by the Statute of Limitations, commencing at a date prior to the date of these letters ; and that the mortgage, although made to Root, was in fact negotiated by Morrow, and that the money was paid by him.

The learned Judge accordingly entered a verdict for the plaintiff.

During Easter Term, May 16, 1876, *D. McCarthy*, Q. C., obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant William Wood, the elder, in pursuance of the Law Reform Act and amendments thereto, or a nonsuit entered, on the ground that the said defendant clearly shewed that he had possession for more than twenty years, and that there was no acknowledgment in writing to prevent the operation of the Statute of Limitations.

During this term, August 30, 1876, *Lount*, Q. C., shewed cause. The Statute of Limitations did not operate in favour of the defendant prior to 1859, when the mortgage to Root, reciting the land as being the property of William Wood, the younger, was executed : *Jones v. Williams*, 2 Stark. 52 ; *Bowman v. Taylor et al.*, 2 A. & E. 278 ; *Carpenter v. Buller*, 8 M. & W. 209 ; *Foster v. Britannia Mutual Life Assurance Company*, 3 E. & B. 48 ; *Doe d. Guisford*

v. *Stone*, 3 C. B. 176. There was a sufficient acknowledgment in writing of title to satisfy section 14 Consol. Stat. U. C. ch. 88: *Williams v. McDonald*, 33 U. C. R. 423; and at all events defendant, by his conduct, was estopped from availing himself of any possession which he had prior to 1859: *Dean v. Thwaite*, 21 Beav. 621; *Smith v. Acton*, 26 Beav. 210; *Davis v. Snyder*, 1 Grant 134; *Regina v. Shropshire Union R. W. and Canal Co.*, L. R. 8 Q. B. 420; *Humble v. Hunter*, 12 Q. B. 310; *Cole on Ejectment*, 479.

D. McCarthy, Q. C., contra. There was nothing to prevent defendant availing himself of his full possession: *Doe d. Palmer v. Eyre*, 17 Q. B. 366. There was no written acknowledgment here to the person entitled to the land or to his agent, so as to satisfy the 14th section of the Statute of Limitations, for at the time of the so called acknowledgment Morrow had no right or title to the land, and as defendant had no title at the time of the execution of the mortgage, he ought not to be estopped from setting up a title which subsequently accrued to him. *Doe Baddeley v. Massey*, 17 Q. B. 373; *Ford v. Ager*, 2 H. & C. 279.

September 26, 1876, HARRISON, C. J.—It appears from the evidence, that before and at the time of the execution of the mortgage by William Wood, the younger, to Root, the defendant William Wood, the elder, was in possession of the land mortgaged either as a tenant at will or tenant at sufferance under William Wood, the younger.

It also appears that before and at the time of the execution of the mortgage, the defendant William Wood, the elder, represented to the intending mortgagee or the agent of the intending mortgagee, that the land was the property of William Wood, the younger, and that he was besides most active and pressing in soliciting a loan to be secured by the mortgage.

These things being so, William Wood, the elder, cannot, in our opinion, now be allowed, as against the mortgagee or those claiming under him, to set up any title which he

before then had in the land, or to avail himself of any possession which before then he had enjoyed, so as by the addition of subsequent possession to make twenty years, and thereby defeat the title of the mortgagee.

In short, we are of opinion, that the right of entry of the mortgagee as against defendant, did not accrue until after the making of the mortgage; and as this was within twenty years of the bringing of the action, the plaintiff is entitled to recover.

In *Doe d. Palmer v. Eyre*, 17 Q. B. 366, 372, it is said by Lord Campbell, that "A case may be put, where a person who has occupied as a tenant at sufferance nearly twenty years without payment of rent or written acknowledgment, might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises and going on, for a great many years afterwards, paying interest to the mortgagee. But it cannot be considered to have been an object of the Legislature to protect the interest of such a person."

It is therefore unnecessary to decide as to the sufficiency of the written acknowledgment of title to bring the case under section 14 of Consol. Stat. U. C. ch. 88.

The rule *nisi* must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

MORROW V. EDWARD RORKE AND WILLIAM RORKE.

Chattel mortgage—C. S. U. C. c. 45, s. 9—Removal of goods to another county—Omission to file there—Purchase with notice of the mortgagee.

Sec. 9 of the Chattel Mortgage Act, C. S. U. C. ch. 45, provides that in the event of the permanent removal of the goods mortgaged into another county, a certified copy of the mortgage shall be filed in such county within two months from such removal, otherwise "the mortgage shall be null and void as against subsequent purchasers and mortgagees for valuable consideration, as if never executed."

Held, that the words "in good faith," found in secs. 3 and 4 of the Act, could not be imported into this section after "mortgagees"; and that a purchaser for value of the goods, though with notice of the mortgage, was entitled as against the mortgagee.

REPLEVIN.

The plaintiff declared against the defendants for detaining from the plaintiff his goods and chattels, that is to say, one hearse.

Pleas 1. That they did not detain the goods or any of them as alleged.

2. That the goods were not the property of the plaintiff as alleged.

3. That the goods were the property of one Joseph Rorke, and not of the plaintiff as alleged.

Issue.

The cause was tried at the last Spring Assizes, for the county of Grey, before Patterson, J., and a jury.

The plaintiff was a resident of the town of Barrie, in the county of Simcoe. The defendants while residents of the same town, on March 11th, 1873, made and executed in favour of the plaintiff a chattel mortgage on the hearse in question, described as being "upon town lot number eighteen, on the east side of John street, in the said town of Barrie." The mortgage was for the expressed consideration of \$150, and contained a proviso to be void on payment of the sum of \$150 in six months from the date thereof.

It also contained a stipulation that in case default should be made in payment of the said sum of money, in the said proviso mentioned, or the interest thereon, or any part

thereof, or in case the said parties of the first part should attempt to sell or dispose of, or in any way part with the possession of the said goods and chattels, or any of them, or remove the same, or any part thereof, out of the county of Simcoe, without the consent of the said party of the second part, his executors, &c., to such sale, removal, or disposal thereof, first had and obtained in writing, then, and in such case it should be lawful for the mortgagee to take possession of and sell the goods and chattels mortgaged.

The mortgage was duly filed in the county of Simcoe.

The plaintiff received some payments, leaving, as he swore, \$72 due to him at a settlement made on 21st September, 1874; but the settlement was denied by the defendants, who swore that that they had paid the amount due to the plaintiff.

The plaintiff also swore that before the alleged settlement defendants had delivered the hearse to him, and afterwards removed from Barrie, in the county of Simcoe, to Clarksburg, in the county of Grey, taking the hearse with them, on the understanding that they were to pay the plaintiff \$2 per month until he was paid.

This understanding was denied by the defendants.

The hearse, however, was taken from Barrie to Clarksburg, and the plaintiff omitted, under section 9 of Consol. Stat. U. C. ch. 45, to re-file the chattel mortgage in the county of Grey.

The defendants having the hearse in their possession at Clarksburg, and carrying on business as cabinet makers, &c., there, in April 1875, dissolved partnership, the hearse, by agreement, becoming the property of the defendant Edward Rorke.

The defendant Edward Rorke, on 29th July, 1875, sold and delivered the hearse to one Joseph Rorke, for the sum of \$133.50. The purchaser gave to Edward his promissory notes for \$50 each, at one and two years, leaving a balance of \$33.50, which they both swore was covered by an amount previously due from Edward to Joseph Rorke, and which was then discharged.

Shortly before the sale, Edward had told the purchaser of his having given a chattel mortgage on the hearse to the plaintiff in Barrie, but at the same time told him the mortgage was paid, although the plaintiff disputed the payment.

When Edward offered to sell the hearse, Joseph asked him when the mortgage had been given, when Edward said, "over a year before." Joseph then asked him if it had been recorded, and Edward said he did not know. Joseph then asked him if it had been renewed, and Edward said he did not think it had, but did not know. Joseph came to the conclusion, that in the event of his purchasing, the mortgage under the statute would not be good against him unless re-filed in the county of Grey, and so he purchased it. The hearse was replevied while in the possession of Joseph Rorke.

The jury, in answer to questions submitted to them by the Judge, found that in July, 1875, there was money due from the defendants to the plaintiff: that the sale by Edward to Joseph Rorke, was a real sale intended to pass the property from Edward to Joseph, that the purchase by Joseph was made in good faith, but was made by Edward to prevent the plaintiff getting possession under the chattel mortgage, and that William was no party to the sale.

The learned Judge on this finding, entered a verdict for the defendant William Rorke on the first issue, and a verdict for the plaintiff against the defendant Edward Rorke, and damages \$4, and against defendant William Rorke on the second and third issues, reserving leave to the defendants to move to enter the verdict for them, or either of them.

During Easter term, May 15, 1876, *Robert M. Fleming*, obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendant William Rorke, on the second and third issues, and for the defendant Edward Rorke on all or some of the issues, pursuant to leave reserved at the

trial, on the ground that according to the findings of the jury, the verdict should have been entered by the learned Judge for the defendants generally, on the law and evidence.

During this term, August 28, 1876, *Bethune*, Q. C., shewed cause. Sections 3 and 9 of Consol. Stat. U. C. ch. 45 should be read together as protecting only a subsequent, purchaser in good faith for valuable consideration, and Joseph was not such a purchaser.

Robert M. Fleming, contra. The omission of the words "in good faith," from section 9 of the Act, shewed that the object of the Legislature was to protect all purchasers for valuable consideration, and that the omission was designed.

September 26, 1876. HARRISON, C. J.—It is by section 3 of Consol. Stat. U. C. ch. 45, provided that in case a chattel mortgage or conveyance be not registered as in the Act provided, the mortgage or conveyance shall be absolutely null and void, "as against creditors of the mortgagor, and against subsequent purchasers or mortgagees *in good faith* for valuable consideration."

It is provided by section 4, that every sale not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing and filed as therein directed, within five days from the executing thereof, "otherwise the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees *in good faith*."

It also provided by section 9, that in the event of the permanent removal of the goods and chattels mortgaged as aforesaid, from the county or union of counties in which they were at the time of the execution of the mortgage to another county or union of counties, before the payment and discharge of the mortgage, a certified copy of such mortgage under the hand of the clerk of the County Court, in whose office it was first registered, and under the seal of the said Court, and of the affidavits and documents and

instruments relating thereto, in such office, "*shall* be filed with the clerk of the County Court of the county or union of counties to which such goods or chattels are removed within two months from such removal, *otherwise* the said goods and chattels shall be liable to seizure and sale under execution, and in such case, the mortgage shall be null and void as against subsequent purchasers and mortgagees for valuable consideration, *as if never executed*."

It is argued that the Legislature intended to use the words "in good faith" in section 9 as in sections 3 and 4; that the omission was accidental, and that, reading all the sections together, the omission ought to be supplied by the Court—in other words, that the phrase "subsequent purchasers and mortgagees for valuable consideration," should be read as "subsequent purchasers and mortgagees for valuable consideration in good faith."

Joseph Rorke is a purchaser for valuable consideration, who bought the hearse knowing that the hearse had been mortgaged, but knowing also that the mortgage had not been re-filed as directed by the statute, and believing that the Legislature meant what it, the Legislature, said, when it declared that "in such case," the mortgage should be "as if never executed."

In *Doe d. Pell v. Mitchener*, Dra. 484, it was held that where A., being seized of real estate, conveyed to B. and died, and A's. heir conveyed the same land to C., who had his deed registered immediately, that under the Registry Act, then existing, the deed last registered was void as against the deed first registered, notwithstanding C. had actual notice of B's. deed when he purchased. See also *Ellis v. Grubb*, 3 O. S. 611. See further *Ferrass v. McDonald*, 5 Grant 310; *Hollywood v. Waters*, 6 Grant 329.

It is not the province of the Court to make laws, but to expound laws when made. And the Court when expounding laws ought not, on mere conjecture, to add to or take from the words used by the Legislature, unless it be clear beyond doubt that the Legislature, by the language used, intended something which it has failed precisely to express :

See Per Tindal, C. J., in *Everett v. Wells*, 2 M. & G. 269, 277.

Words therefore cannot be added to an Act to supply an omission which may be thought on merely conjectural grounds to have been unintentional.

Thus the 21 Jac. 1, having provided that the Statute of Limitations should not run while the plaintiff was beyond the seas, and the 4 & 5 Anne, having made a similar provision where the defendant was abroad, the 3 & 4 Wm. IV. ch. 42, enacted that no part of the United Kingdom should be deemed beyond the seas, within the meaning of the former Act, but made no mention of the latter Act, the Court refused to stretch the 3 & 4 Wm. IV. ch. 42, so as to include the statute of Anne: *Lane v. Bennett*, 1 M. & W. 70. See also *Battersby v. Kirk*, 2 Bing. N. C. 584.

Lord Abinger in delivering judgment in *Lane v. Bennett*, at p. 73, said: "The great probability, however is, that the omission to name the statute 4 & 5 Anne, is an oversight; but even if satisfied that it was so, we could not supply the defect,"

The Legislature must be intended to have known the meaning of the words used, and to have designed the omission of words where a plain omission is apparent.

Looking at the Act as Judges, we have no more power to insert the words "in good faith" in section 9, than we have to strike them out of sections 3 and 4. Such a change would be so violent as to amount to framing a new section, instead of interpreting what we find. See Per Williams, J., in *Green v. Wood*, 7 Q. B. 178, 186..

It is much safer for the Court to read the section as it finds it, leaving it to the Legislature to amend the section if the reading be not that which the Legislature intended.

The plaintiff failed to re-file his mortgage as the statute directs. The consequence is, that the mortgage as against certain persons described in section 9 is as void as if never executed. Joseph Rorke is one of the class described. And so the mortgage is void as against him, "as if never executed."

This decision is predicated on the assumption that Joseph Rorke is a party to this action. But in truth he is not a party. The hearse was taken out of his possession, he claiming it as his own, but taken under a writ of replevin against Edward and William Rorke. The latter, on the finding of the jury, had no right or claim to the property at the time the writ was issued, nor for several months prior thereto. They did not, at the time of the issue of the writ, make any claim to the hearse. They were, therefore, on the finding, entitled to a verdict on the first issue.

The rule must be made absolute to enter a verdict for the defendants.

MORRISON, J., and WILSON, J., concurred.

Rule absolute (a).

(a) Section nine of Consol. Stat. U. C. ch. 45 has since this decision been amended by the insertion of the words "in good faith" after the words "purchasers and mortgagees": 40 Vic. ch. 9 sec. 29, O.

MCLAREN V. KERR.

Covenant to clear and fence—Construction—Forfeiture—Waiver.

The lessee covenanted to clear up and fence five acres each year, and to split and put up into fences 500 rails each year to fence said land cleared by him; and there was a right of re-entry on breach. This number of rails would not nearly fence five acres. *Held*, that the covenant was satisfied by clearing five acres each year and fencing it with a fence of some kind—in this case a brush fence—having in it 500 rails.

Held, also, that the clearing need not be in blocks of five acres; and that defendant having finished clearing three acres which had been chopped by the plaintiff, part of a larger field, but was unfit for cultivation without logging, burning, &c., and fenced it on one side so as to form a lane which was required between this fence and an old fence there before, and having cleared more than two acres elsewhere, had complied with the covenant.

Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; for the difficulty of construing the covenant is a special circumstance entitling the defendant to relief.

Mere knowledge of, or acquiescence in, an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements, or some positive act of waiver, such as receipt of rent.

EJECTMENT to recover possession of a portion of lot thirty in the twelfth concession of the township of Huron containing 97½ acres of land.

The plaintiff claimed title to the land under deed from Daniel Kehoe.

The defendant claimed title under a lease from the plaintiff to the defendant of the land in question for an unexpired term.

The cause was tried before Patterson, J., at the last Spring Assizes for the county of Bruce, without a jury.

The plaintiff on 17th September, 1874, executed and delivered to the defendant a lease of the land in question for the term of five years, to be computed from 1st January, 1875, at the annual rental of \$150.

The lessee covenanted that he would farm during the term, by a regular rotation of crops in a proper farmer-like manner, so as not to impoverish or injure the soil of the land, and “would use his best and earnest endeavours to rid said

lands of all docks, wild mustard, red roots, Canada thistles, and other noxious weeds."

It was also agreed "that the lessor was to stump ten acres and log five acres on said place," and the lessee was "to clear up and fence five acres each year during the term," and the lessee was to fence the fifteen acres cleared by the lessor or split and put up into fences 500 rails each year to fence said land cleared by the lessee.

There was also the usual proviso for re-entry by the landlord on nonpayment of rent, "or in case of a breach of any of the covenants" in the lease contained.

The landlord on the 15th January, 1876, demanded possession of the land by a notice in writing, addressed to the lessee: "As you have not complied with the conditions of the lease entered into between you and myself."

Defendant having refused to give up possession this action was commenced by writ of ejectment issued on 31st January, 1876.

The defendant in his evidence described the farm as being the "thistliest" place he ever saw.

The landlord, who was also called as a witness, did not quite agree in this description of the farm by the lessee, but complained that the lessee had not used "his best and earnest endeavours" for the destruction of the thistles.

He also complained that the lessee had not fenced the 15 acres which he, the landlord, was to clear and log, and which he had cleared and logged as he had agreed.

The time for cutting the thistles was July. The landlord and his witnesses swore that thistles were allowed to grow in great abundance. The lessee and his witnesses swore that he had used his best and earnest endeavours to cut them, and had cut many of them.

It was not shewn that the landlord at the time had made any complaint to the defendant of not cutting the thistles; but it appeared that, on the contrary, without making any complaint he had permitted defendant to put in his fall crops.

The seven and three-quarter acres cleared by the lessee were not left wholly unfenced. One side was fenced with

old rails, but the fence was principally what is called "a brush fence."

Defendant proved that during the year he put more than 500 rails on the place in making fences where he had cleared.

The learned Judge found that the defendant could not reasonably have been expected to do more than he did do in removing the thistles, and refused to find that he did not use his best and earnest endeavours in and about the removal of the thistles.

The learned Judge held that the proper construction of the covenant as to fencing, and the only one which gives effect to all parts of it, is that the reference to the 500 rails a year assists in deciding what kind of fence is intended: that the plaintiff could not contend that five acres should be fenced each year with a rail fence, but that while he has a right to have 5 acres fenced each year with a fence of some kind, the year's fencing must include 500 rails, and the 500 rails must be used to fence land cleared by the lessee.

He found that the lessee did clear five acres, and fenced that clearing with a brush fence which was sufficient to protect the crops, and as good as a brush fence usually is: that it included 141 rails: that defendant finished clearing three acres in another part of the farm, which had been chopped by plaintiff, but which could not have been cultivated without logging, burning, &c.: that the defendant had cleared these three acres within the meaning of the covenant: that the field which included these three acres was fenced on its west side by an old fence, which divided it from an old clearing, and therefore did not require another fence on that side for the mere purpose of enclosing the field; but the field lay between the barnyard and a slash: that it was the pasture ground of the farm, and in order to protect any crops from cattle passing to and fro between the barn and a pasture, a lane was necessary: that the defendant accordingly made a fence with 407 new rails, forming the western fence of the field, and leaving a lane between it and the old fence: that this fence fenced

land cleared by the lessee: that if the three acres had formed part of a large tract, the rest of which remained as a pasture ground, a fence between the clearing and the pasture would obviously fence the cleared land: and that it equally does so when it divides the clearing from a lane.

The result was that the learned Judge entered a verdict for the defendant.

During Easter term, May 22, 1876, *C. Robinson*, Q. C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, upon the ground that on the law and evidence the plaintiff was entitled to recover: the defendant's covenants in the lease to clear up and fence five acres each year during the term, and put up into fences 500 rails each year, to fence said land cleared by the lessee, and to use his best and earnest endeavour to rid the land leased of all docks, wild mustard, Canada thistles, and other noxious weeds, and to cultivate, till, manure, and employ that part of the land under cultivation in a good, husbandlike, and proper manner, having been broken, and the breaches of covenant for which the action was brought having been proved.

During this term, September 6, 1876, *Bethune*, Q. C., shewed cause. The breaches of covenant have not been proved. If the covenants were broken there was a waiver of the breach, and the services were in the nature of a money payment of rent, against which equity would relieve. He asked if necessary to be allowed to add an equitable defence to that effect: *Winthrop v. Murray*, 8 Hare 214; *Shearman v. McGregor*, 11 Hare 106; *Burgent v. Thompson*, 4 Giff. 473; *Joyce* on Injunctions, vol. i. 222; *Kerr* on Injunctions, 84.

C. Robinson, Q. C., contra. Breaches were shewn of the covenants to cut Canada thistles, and to fence. The learned Judge erred in supposing that the old brush fence did include 141 rails. [*Bethune*, Q. C.—Although the rails were inside the brush fence, they were so connected with it at the ends as to form only one fence]. There was no

waiver by the plaintiff: *Doe Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Sore v. Eykins*, 1 C. & P. 154; *Doe d. Nash v. Birch*, 1 M. & W. 402; *Woodfall's L. & T.*, 10th ed., 295. Neither as to the thistles nor the fence is the case one for mere compensation, so as to enable a Court of equity to restrain the action: *Snell's Equity*, 3rd ed., 290; *Taylor's Eq. Jur.* 1104, 1107; *Consol. Stat. U. C.*, ch. 27, secs. 51, 56.

September 26, 1876.—HARRISON, C. J.—If it could on the evidence be held that there was a forfeiture of the lease we would feel great difficulty in holding either that there was any waiver on the part of the landlord, or that the facts present a case for equitable relief.

Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to waiver. There must be some expenditure of money in improvements or some positive act of waiver, such as receipt of rent: *Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376; *Doe d. Sore v. Eykins*, 1 C. & P. 154, 155 note; *Doe d. Nash v. Birch*, 1 M. & W. 402; *Gibson v. Doeg*, 2 H. & N. 615.

So far as the fences are concerned there is no room for the application of any such principle, and so far as the thistles are concerned, although more may be said in favour of the application of the principle, I shall hereafter dispose of them on another ground.

It was formerly held in several cases that relief might be given in equity against forfeiture on covenants where compensation could be made, even although the act or omission were voluntary, but this doctrine may be considered now as overruled, and relief is only given where the breach of covenant has been the omission of a simple payment, such as rent, unless under very special circumstances: *Joyce on Injunctions*, Vol. i. 222; *Snell's Equity* 3rd ed. 290. See further *Hughes v. The Metropolitan R. W. Co.*, L. R. 1 C. P. D. 120.

The special circumstances appear to be accident, mistake, fraud or surprise: *Taylor's Eq. Jur.* sec. 1106.

The only special circumstance shewn here is, as regards

the fences, that the covenant is so expressed that it is almost impossible to construe it.

This is a special circumstance of which a Court of justice must take cognizance when that Court is asked to turn a man out of possession of land on the alleged ground of breach of covenant amounting to a forfeiture.

Where a covenant in a lease on the part of a lessee accompanied by a right of re-entry on breach of covenants is so expressed that its meaning is doubtful, and it appears that the tenant in good faith did what he supposed to be a performance of the covenant, it would be most unjust for any Court, whether of law or equity, to turn such tenant out of possession, and no Court would do so unless compelled to do so on being in some manner satisfied that the meaning of the covenant is reasonably clear.

Although, when a certain construction has been put by a Court of law on a deed, it must be taken that the legal construction was clear, yet the ignorance *before* the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the deed was to be construed. Per Lord Chelmsford in *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, 234.

In *Doe d. Wyndham v. Carew*, 2 Q. B. 317, 321, where a lease contained the following proviso: "If the said C. (the lessee) shall either by his own acts or by bankruptcy, insolvency, writ of extent, or writ of execution by *fi. fa.* or other act of law, or by any other means, whereby, either voluntarily or without or against his consent whereunder the said premises demised or any part thereof would, in case this proviso did not exist, be liable to be seized by the sheriff or any other person, or in case the said C. shall at any time or times hereafter make breach or default in the performance of the covenants, &c., then, and in either of the cases, this present indenture and the term hereby created shall thenceforth cease and determine," &c.; on ejectment brought upon forfeiture supposed to have occurred by execution of a *fi. fa.* issued against the lessee, Lord

Denman said, p. 321 : "I am of opinion that the Court is not bound to find out a meaning for a proviso framed as this is;" and the other Judges concurring the rule was made absolute to enter a nonsuit.

We think either that the covenant now before us should be construed as ruled by the learned Judge who tried the cause, or that it is insensible.

The obligation to fence fifteen acres cleared by the lessor may be satisfied by the doing of the work at any time during the term.

The remaining allegation as to fencing is for "the lessee to clear up and fence five acres (not saying in blocks) each year during the term * * * and will split and put into fences five hundred rails each year to fence said land cleared by lessee."

It was shewn that 500 rails would be wholly inadequate to the fencing of five acres. It cannot therefore have been intended that the five acres should have each year a rail fence. The only way of giving any meaning to the words is, to read them as imposing on the lessee the duty not only to clear yearly five acres, but to fence them with fences of some kind, not otherwise described than as having in them 500 rails.

The lessee cleared more than five acres in the year 1875, and used in fencing more than 500 rails. If the three acres be taken as a portion of the five acres, a portion of the rails was used in fencing them, and the remainder of the 500 rails were used in placing a fence around another portion of land cleared by the lessee during the same year. Whether the latter rails were actually placed in the last mentioned fence, or by themselves constituted a fence connected therewith, is, under such a covenant, of little consequence. So far as any sensible meaning can be attributed to the covenant, the defendant may, on the evidence, be justly held to have substantially complied with it. The learned Judge has so found, and we are not inclined on the evidence to disturb his finding.

There is less difficulty in dealing with the finding as to

the thistles. The burthen was on the plaintiff to shew that defendant did not use his best and earnest endeavours in destroying Canadian thistles. The learned Judge refused so to find. On the contrary, he found that defendant had used his best and earnest endeavours. The evidence we think sustains this finding.

For these reasons we are of opinion that the plaintiff has failed in the action, and that the verdict was rightly entered for the defendant.

But there is another reason which we may mention, although we do not rest our judgment upon it. The plaintiff claims title under a deed from Daniel Kehoe. The defendant claims title under a lease from the plaintiff. The defendant, on proof of this lease, was entitled to the verdict, for in such a case the plaintiff cannot rely, in answer to the lease, upon a forfeiture of the lease for non-performance of covenant, unless the plaintiff has set up the forfeiture in the notice of title: *Pettigrew v. Doyle*, 17 C. P. 34, affirmed in Appeal, *Ib.* 459. This case was recognized in *Hartshorn v. Early*, 19 C. P. 139, and distinguished in *Armday v. Armstrong*, 21 C. P. 4.

Where a landlord seeks to take advantage of a forfeiture claimed under circumstances such as appear in this case, he should be in a position to shew, not only on the evidence, but on the pleadings or record, that he is entitled to succeed.

The Courts always lean against forfeitures, and plaintiffs, seeking to take advantage of forfeitures, knowing this, should be in such a position as to claim their rights without asking any favour of any Court.

WILSON, J., concurred.

MORRISON, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

MACLENNAN ET AL. V. THE ROYAL INSURANCE COMPANY.

Insurance company—Lease—Exclusion of lessee—Authority of agent.

The agent of an insurance company at Toronto negotiated for a lease to the plaintiffs, who were barristers, &c., of one flat of the company's offices for three years at \$600 a year, and executed the lease on the part of the company, containing the usual covenant for quiet enjoyment, and received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 P.M., thus excluding the plaintiffs after that hour, and the agent refused to let them have a key unless they got the caretaker to be present.

Held, that the company were responsible for this act of their agent, which was clearly a denial of the plaintiffs' rights under the lease.

THIS was an action brought by the plaintiffs against the defendants for wrongfully hindering, preventing, and obstructing the plaintiffs, their clerks and servants, from obtaining access to certain rooms and offices leased by the defendants to the plaintiffs.

The principal points raised at the trial were, that there was no interference with the plaintiffs' right to enjoy the premises leased: that they had only the right to use the appurtenances in the same way they had been used by others: that what was done was the act of the caretaker of the building, and was a mere breach of duty on his part towards the plaintiffs; and that the defendants were not liable.

The cause was tried before Burton, J., at the last Toronto Winter Assizes.

The learned Judge nonsuited the plaintiffs on the ground, assuming the acts complained to be illegal, that they were acts done under the authority of the general agent who managed the company's insurance business, and were not within the scope of his authority, and that the company would be no more responsible for them than if he had committed an assault or other act which the company had not authorized, or if done for their interests, had not ratified.

From the evidence at the trial it appeared that by indenture of lease made between the company and the plaintiffs

dated the 4th of December, 1871, by which the defendants leased to the plaintiffs all and singular those certain rooms and offices situate in the Royal Insurance Company's buildings, in the city of Toronto, being the whole flat immediately over that occupied by the said company and lately used as the office of the City Registrar, together with all the rights, members and appurtenances whatsoever to the said premises belonging or appertaining. The term was for three years at \$600 a year. The lease contained the usual covenants for quiet enjoyment, &c., the defendants covenanting also to provide the plaintiff with storage for fuel, and water for the use of the offices. The lease was admitted, and the authority of the agent Mr. Heward to execute it on the part of the defendants. It appeared also that Mr. Heward was the person with whom the arrangements were made for the lease, and to whom the rent was paid and to whom complaints were made when necessary. The plaintiffs were barristers, &c. What they complained of was, that the caretaker of the building, who lived at a considerable distance from the offices in question, would lock the outer door which led from the street to plaintiffs' offices at 6 p.m., so the plaintiffs could not get into the offices after that hour, and were prohibited using them for the purpose of their profession, and could not get in before the morning: that they applied for a key to this outer door so that they might get to their offices at any time, but that the agent Mr. Heward would not consent to their having a key unless they got the caretaker to be present during the times they were in their offices after six o'clock: that their being so prevented both in the morning and evening put them to great inconvenience, &c., that the right to close the door was claimed by the agent, he saying that if anything happened to the building the defendants would hold him responsible.

Mr. Heward, the agent, did not deny that such complaints were made, and that he refused a key to the plaintiffs. He however said that he told the caretaker to attend in the evening when the plaintiffs required him: that the

offices were under his care and what he had done he did as agent of the defendants.

During Easter term, May 22, 1876, *John S. Ewart* obtained a rule *nisi* to set aside the nonsuit and to enter a verdict for the plaintiffs for such amount as the Court may think the plaintiffs entitled to, on the ground that the learned Judge who tried the cause improperly held that the defendants were not liable for the acts of their agent; or for a new trial.

During this term, September 5, 1876, *M. C. Cameron*, Q. C., shewed cause.

Bethune, Q.C., supported the rule.

September 26, 1876. MORRISON, J.—As to the first objection urged by the defendants, we are clearly of opinion, as we expressed ourselves on the argument of the demurrer in this cause, that the plaintiffs, under their lease, were entitled at all times to ingress and regress to and from their offices; and that the defendants had no right to obstruct or prevent the plaintiffs having free access to the demised premises at all hours and times. When a party rents to another, premises, he impliedly grants all that is indispensable for their free use and full enjoyment. The use of the entrance passage and stairs was here clearly necessary to the use and full enjoyment of the offices and rooms. If the defendants deemed it necessary for any reason that the street entrance should be closed and locked at and between particular hours, they should have inserted a stipulation to that effect in their lease. It seems to me it would be most unreasonable to hold that professional gentlemen renting offices at a high rent without any limitation as to their user of them, should be restricted to any particular hours, or be subject to any such control or to the annoyance or inconvenience that these plaintiffs complain of.

I see no reason why these plaintiffs might not have used some of these rooms as sleeping apartments, and for that

purpose enter at all hours of the night and day without the leave or consent of the defendants.

It was, however, contended that the defendants were not liable for the acts of their agent, Mr. Heward. It is quite clear, and the fact was not denied, that the matters complained of were done under the instructions and by the authority of that gentleman, and the only question is, are the defendants liable for his acts?

Mr. Heward was the agent of the company in the leasing of the premises. He negotiated the lease and executed it on their part, and he received for them the rent. He also, as agent, had charge of the building, of which the plaintiffs' and defendants' offices formed part, and, as he himself stated at the trial, the building was under his charge as agent of the defendants; in other words, what was done was done under his instructions, and, as he alleged, for the protection of the premises; and, as he further contended he was justified in doing, as he adopted a similar course when the same offices were occupied by former tenants. He was acting as agent for the defendants, as owners and lessors of the premises, and it is fairly to be inferred that what he did was a matter which the company placed in his discretion as their agent, and that in doing the acts complained of he was exercising the authority so intrusted to him for their benefit. As such he was treated by the plaintiffs, and he was acting in a way that no one without authority would act. If an agent in the exercise of authority makes a mistake, the principal is responsible for the consequences of that mistaken right of the company.

Upon these grounds, we are of opinion the defendants are liable, and that the nonsuit must be set aside, and that the verdict should be entered for the plaintiffs.

The remaining question is, the amount of damages. At the trial, two professional gentlemen were called to estimate the damages. All that they could say was that it was difficult to do so—that to so debar the plaintiffs of the right of access to their offices was a very great inconvenience, and that the power to exercise such a right would

render the offices worth much less than the rent reserved by the lease. No evidence was given to shew that the plaintiffs suffered what may be termed substantial damages, and we may assume that this action was brought to try the right.

I think the rule should be absolute to enter a verdict for the plaintiffs and \$10 damages, with certificate for full costs.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

CONWAY V. SHIBLY.

False imprisonment—Evidence to connect defendant—Rejection of evidence—Nonsuit.

In an action for arresting the plaintiff, who had been imprisoned on a charge of stealing trees, the magistrate who ordered the arrest was not called, nor the constable; nor was the warrant produced; and it was not shewn positively who was the prosecutor. It was shewn only that defendant claimed the land on which the timber was cut by the plaintiff: that he was at the investigation before the magistrate, and wanted the plaintiff to settle; and that afterwards, as the plaintiff was about being taken to gaol, the proposition to settle was renewed, and when the plaintiff refused, defendant told the bailiff, who had the plaintiff in the waggon, to drive to gaol. *Held*, not sufficient to charge defendant with the arrest, or with its continuance.

Held, also, upon the facts stated below, that the refusal to receive evidence of the constable and another, when tendered, was a matter in the discretion of the Judge; and that the nonsuit, which was upheld, was not shewn to have been against the plaintiff's consent.

DECLARATION. First count: assault and battery, and arresting plaintiff. Second count: assault and imprisonment. Third count: malicious prosecution for larceny of trees being and growing on lot 7 in the 12th concession of Portland. Fourth count: slander, charging plaintiff with being a thief. Fifth count: slander, charging plaintiff as follows—"He stole more than \$25 worth of trees growing upon my land."

Pleas: 1. Not guilty.

2. To third count: that shortly before the alleged trespass, the said trees, worth more than \$25, the property of the defendant, growing and being on the said land, were feloniously cut down and stolen by some persons, whom the defendants had good reason to believe and did believe to be the plaintiff and one Augustus Conway, and the plaintiff subsequently admitted the said offence to the defendant, whereupon the defendant, then knowing the premises, and by reason thereof having reasonable and probable cause for suspecting, and suspecting that the plaintiff and Augustus Conway were the persons who had feloniously cut down and stolen the said trees, appeared before a justice of the peace having jurisdiction in the premises, and charged the plaintiff and Augustus Conway with the said offence, whereupon the justice, by his warrant in that behalf, caused the plaintiff and Augustus Conway to be arrested and detained for a reasonable time under the warrant, and with all convenient speed to be brought before him, to be dealt with according to law in respect to the said offence; and thereupon the said justice, after due investigation of the matter, committed the plaintiff and Augustus Conway to the common gaol of the county of Frontenac, to be dealt with in due course of law for the said offence; and thereupon the said bill of indictment was duly prepared and sent before the grand jury, and the defendant being duly subpoenaed to give his evidence in that behalf, did attend before the grand jury and give such evidence, and afterwards the grand jury ignored the said bill, which are the alleged trespasses.

3. To first count: like the second plea to the third count.

4. To second count: like the second plea to the third count.

Issue.

The cause was tried at the last Spring assizes at Kingston, before Burton, J.

The plaintiff was nonsuited. There was no evidence to sustain the slander counts.

The warrant was not produced. The constable or magistrate was not called, nor was the defendant.

The evidence of defendant having caused the arrest, was that he claimed the land on which the plaintiff was residing, and upon which the plaintiff and his son cut the timber. The defendant was at the investigation before the magistrate; he wanted the plaintiff to settle for cutting his timber and living on his place. The plaintiff said it was not the defendant's timber or place. The defendant said if the settlement was not made, the trial would have to go on, and send the plaintiff to gaol. After the trial, and as the plaintiff was about being taken to gaol, the defendant handed the driver of the team that was to take the plaintiff to gaol money, or something. Plaintiff said to defendant, would he settle; he supposed it was too late. The defendant said, Oh no, that it was not too late to settle. The plaintiff said, since he had charged him with being a thief, it must go on, and he would go. Defendant then told them to drive on to gaol, and the plaintiff was taken to gaol and confined there for a week, when he was bailed.

The learned Judge was of opinion there was no evidence to connect the defendant with the arrest, or the subsequent imprisonment.

The counsel for the plaintiff tendered evidence of Mr. Lees and the constable, and he objected to the ruling of the learned Judge.

In Easter term, May 17, 1876, *Britton*, Q. C., obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial had, on the ground of the erroneous ruling of the learned Judge in deciding that there was no evidence to go the jury on any count of the declaration, and in ordering a nonsuit, while there was evidence upon the first, second, and fourth counts, which should have been left to the jury; and on the ground that the nonsuit was ordered without the consent of the plaintiff, and because of the improper rejection of evidence of the magistrate and constable, tendered on the trial for the plaintiff.

In this term, September 5, 1876, *Wallbridge*, Q. C., shewed cause. The defendant took no part in the arrest or in the imprisonment, and there was no evidence whatever to connect him with either one act or the other: *Wilson v. Lee*, 11 U. C. R. 91; *Joint v. Thompson*, 26 U. C. R. 519.

Britton, Q.C., supported the rule. The defendant was sufficiently connected with the arrest and imprisonment of the plaintiff, by the plaintiff's evidence, which was uncontradicted—no evidence having been given for the defendant. The defendant tried to settle with the plaintiff before the arrest and after it, and when the plaintiff would not settle, after he had been ordered by the magistrate to be sent to gaol, the defendant told the constable to drive him on to gaol. The Judge also rejected evidence which was tendered to him. He referred to *Addison* on Torts, 4th ed., 573; *Campbell v. McDonell*, 27 U. C. R. 343; *Hope v. White*, 22 C. P. 5; *Stephens v. Stephens*, 24 C. P. 424; *Griffin v. Coleman*, 4 H. & N. 265.

September 26, 1876. WILSON, J.—I think, in the absence of all evidence to connect the defendant with the original arrest, further than may be inferred by what took place between him and the plaintiff and his wife before it, and by what took place at the enquiry before the magistrate, and by what took place between the parties after the magistrate had directed the plaintiff to be sent to gaol, that a case of trespass or of false imprisonment is not made out against the defendant.

It is not shewn positively that he was the prosecutor on that occasion, although the facts before referred to are sufficient to lead one to the opinion that he was so.

But if he were the prosecutor, and laid the complaint before the magistrate upon which the warrant was issued, it does not follow that he is answerable for the arrest.

If he made his complaint to the magistrate, leaving him as the proper functionary to put the law in motion, he is not liable for the arrest.

It does not appear that he asked for a warrant against the plaintiff, but if he had, it would not make him liable for what was done under it: *West v. Smallwood*, 3 M. & W. 418; *Brown v. Chapman*, 6 C. B. 365, 377.

If the complainant accompany the constable, and point out the party to be arrested, that is evidence of his participation in the arrest: *Ib.*

The personal delivery of a writ to the officer by a person, and giving instructions to execute it, may make such person liable: *Barker v. Braham*, 3 Wils. 368; *Kinning v. Buchanan*, 8 C. B. 271; *Green v. Elgie*, 5 Q. B. 99.

All that the defendant did was to try to settle the matter with the plaintiff during the investigation, and after the plaintiff was ordered by the magistrate to be taken to gaol the proposition to settle was renewed between the parties, and when the plaintiff refused to settle, the defendant then said to the officer, who had the plaintiff in the waggon, to drive to gaol.

I think that is not sufficient to make the defendant personally liable for the arrest, or even for its continuance; nor was the defendant's order to take the plaintiff to gaol of any effect, for the plaintiff was then under orders from the magistrate to be taken to gaol, and the defendant could not without the order and leave of the magistrate have taken the plaintiff from the bailiff's custody, who held him under the magistrate's authority.

In some cases the conduct of the party will reflect back upon the past transactions, as in *Green v. Elgie*, 5 Q. B. 99.

Here the most that can be established, if there is any reflecting back to be given effect to, is that the proceedings were taken by the defendant as the prosecutor, but that will not make the defendant necessarily a trespasser for the arrest. There was no evidence to prove the third count, for the termination of the proceedings was not shewn.

The only question is, whether the learned Judge should have admitted the evidence of the magistrate and the constable. We are not informed what their evidence would have been, but that was not asked at the trial.

From the official character of these two witnesses it may be that the evidence is material in the cause. It was not said at the argument it would not be material.

It was said the learned Judge nonsuited the plaintiff against his consent. That does not appear. It is only noted that the plaintiff's counsel objected to the ruling of the Judge: that is, in holding there was no sufficient evidence to make the defendant liable.

If it appeared the nonsuit was expressly against the leave of the plaintiff, the Court must have set it aside, for a nonsuit can only be with the consent of the plaintiff, and if he do not take it when the Judge thinks he should, the Judge then charges the jury to find a verdict for the defendant. But the admission of the evidence at the time it was offered was in the discretion of the learned Judge, and he probably thought that the action was not of that nature that would make it proper for him to grant such an indulgence.

The case may not have been fully tried, but that was the plaintiff's own fault.

HARRISON, C. J., concurred.

MORRISON, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

FITZGERALD ET AL. V. THE GREAT WESTERN R. W. CO.

R. W. Co.—Carriage of goods—Condition—Construction.

The defendants received at Petrolia two car loads of coal oil to be carried to London. The shipping notes stated, "The G. W. R. will please receive the undermentioned property, to be sent subject to their tariff, and under the conditions stated above and on the other side," one of which conditions was that defendants would not be liable for the loss or damage to goods of a combustible nature. One of the cars never arrived, and defendants could give no account of it; the other reached London, and was damaged there, as was supposed, and all the oil in it lost.

Held, that defendants were liable, for the condition related only to risk of carriage.

DECLARATION. First count: for not carrying goods safely, but breaking and injuring them.

Second count: like the first.

Third count: that the defendants were carriers of goods from Petrolia to London, and were the owners of certain railway cars, trucks, and carriages; and the defendants agreed with the plaintiffs that on condition the plaintiffs would build two cisterns or tanks, of suitable size and strength, for the purpose of storing and carrying coal oil therein, the defendants would furnish and provide a certain flat car or truck, and would place and erect the said oil cisterns and tanks on the said flat or truck car, with all necessary appendages thereto to be furnished by the plaintiffs. And it was also agreed that the defendants would carry coal oil in the said cisterns or tanks for the plaintiffs from Petrolia to London, or elsewhere, as the plaintiffs might from time to time elect, for reward to the defendants in that behalf. Averments of due performance by the plaintiffs of the building of the cisterns or tanks, &c.; and that the defendants placed the same on a flat car, and the plaintiffs filled the cisterns or tanks with coal oil at Petrolia, to be by the defendants safely carried from thence to London, there to be delivered to the plaintiffs for reward; and all conditions were performed, &c. Yet the defendants did not safely carry the said flat car or truck and coal oil tanks, and so negligently carried the same that the coal oil

tanks and fixtures were broken and destroyed, and the coal oil was damaged and lost to the plaintiffs.

Fourth count: stating the contract to carry in a reasonable time. Breach: that the goods were lost by the negligence of defendants.

Fifth count: common counts.

Pleas: 1. Not guilty.

2. To first count: that the defendants did not promise as alleged.

3. To first count: that defendants did use due care, and they did not break or injure the goods.

4. To second and fourth counts: that the plaintiffs did not deliver the said goods to the defendants, nor did defendants receive the same on the terms and conditions therein alleged.

5. To third count: that defendants did not agree with the plaintiffs as alleged.

6. To fifth count and remainder of declaration: that defendants were never indebted.

7. To so much of the declaration as complains of the loss of coal oil; that the same was received by defendants under a special contract made with the plaintiffs, one condition of which was that the defendants would not be liable for damages for the loss or damage to goods of a combustible or dangerous nature, and that the said coal oil was of such a nature, and the defendants are not liable for its loss. And another condition was that lumber, staves, lath, shingles, tanbark, vehicles, (except when tightly boxed), fresh-fish, fruit, meat, dressed hogs, poultry, oil, molasses and other perishable articles were carried only at the risk of the owners or parties by whom they were consigned, and by the special agreement defendants were not liable for the damage done to the coal oil.

Issue.

Replications: 1. To the 7th plea, on equitable grounds: the special contract mentioned in the plea are that certain receipts prepared by the defendants and given for the goods by the defendants to the plaintiffs at the request

of the defendants, and after the delivery by the plaintiffs to the defendants to be carried, as in the declaration mentioned, and the terms and conditions thereof in the plea mentioned are certain terms and conditions of carriage endorsed on the said receipts, and not otherwise. And the plaintiffs aver that their attention was not called to, and that they did not know and had no notice of the said special conditions in the plea mentioned or endorsed on the receipts, and that if they had been notified thereof or if the same had been brought to their knowledge by the defendants before or at the time of the delivery of the said goods to the defendants to be carried, the plaintiffs would not have delivered the said goods to the defendants to be carried, as the defendants well knew. Wherefore the plaintiffs say that the defendants ought not in equity to be allowed to say that the said goods were delivered to them by the plaintiffs and that they received the same upon the special contract and the terms and conditions thereof in the plea mentioned.

2. To seventh plea : similar to the preceding.

Issue.

The cause was tried at the last Spring Assizes, at London, before Morrison, J., without a jury.

The evidence shewed that the car No. 279, sent from Petrolia on 24th October, 1872, had never arrived in London; and that car 267 sent from Petrolia on 8th November, and which reached London on the 9th of the same month, was badly damaged as was supposed after it had reached London, and all the oil in it lost.

The learned Judge allowed for the car

load which had never arrived.....	\$140 85
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And for the car load damaged and lost...	145 50
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And for interest	51 48
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Making in all.....	\$337 83
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For which he entered a verdict for the plaintiffs.

During Easter term last, May 20, 1876, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiffs to shew cause

why the verdict should not be set aside and a verdict entered for the defendants, pursuant to the Law Reform Act, the verdict being contrary to law and evidence.

In this term, September 2, 1876, *Fitzgerald* shewed cause, *Meek* with him. The conditions relate to the carriage of the goods. One car load was not carried at all; the other was damaged and the oil lost after the car had reached London, and the carriage was over: *Hall v. Grand Trunk R. W. Co.*, 34 U. C. R. 517; *Lyon v. Mells*, 5 East 428; *Bodenham v. Bennett*, 4 Price 31; *Wyld v. Pickford*, 8 M. & W. 443; *Farr v. Great Western R. W. Co.*, 35 U. C. R. 534.

M. C. Cameron, Q. C., supported his rule. The actual contract was the one contained in the conditions, and they protect the defendants from liability. These conditions are construed strictly against the owners of the goods: *Harris v. Great Western R. W. Co.*, L. R. 1 Q. B. D. 515.

September 26, 1876. WILSON, J.—There is no reason to doubt that the oil in question was carried by the defendants, subject to the conditions which are contained in the order of the consignors, who were the agents of the plaintiffs, which they delivered to the defendants at the time when the two car loads of oil were respectively delivered to be carried from Petrolia to London.

Each of these documents states as follows: "The G. W. R. Co. will please receive the undermentioned property, to be sent subject to their tariff, and under the conditions stated above and on the other side," and each of these documents is signed by the plaintiffs' agent.

There is no room, therefore, to doubt that the oil was carried subject to these conditions. The case of *Harris v. Great Western R. W. Co.*, L. R. 1 Q. B. D. 515, cited by Mr. Cameron, expressly applies here.

The first car load, which never arrived in London, is not shewn to have been carried by the defendants, although they received it for carriage. The condition set out in the seventh plea cannot, therefore, apply, as it relates only to risk of carriage. The defendants can give no account of

that car load after it was ready for transit at the station for loading. They must be required to give some account of the property entrusted to them. The plaintiffs upon the evidence having shewn the loading of the oil at Petrolia and its non-arrival in London, are entitled to recover in the absence of an account by the defendants of what they have done with the oil.

Then as to the car load which was lost by damage to the car and to the tanks upon it, on the arrival of the car in London. The transitus would not have been at an end, although the journey was over, so as to have excluded an unpaid vendor from stopping the goods if the vendees had failed. The goods were still in the possession of the railway company, and had not come to the actual custody of the consignees.

But that rule does not apply upon these conditions. The destination of the oil was reached. Notice was given to the plaintiffs of its arrival for them in London. They were no longer in course of carriage.

The car was injured and the oil upon it was lost after arrival at its final destination, and before a reasonable time had elapsed, so far as I can make out, for the plaintiffs to have removed it.

How the damage was done does not expressly appear, but it must have been by a collision with other cars of the defendants in their station grounds.

If the loss could be said to have occurred to the two cars or to either of them in the course of carriage—that is, during the time of the journey, or after delivery for carriage, and before the train had started—I should hold that the condition pleaded was a defence, and that the equitable replications were not proved: *Farr v. Great Western R. W. Co.*, 35 U. C. R. 534, and the cases there referred to.

The rule will be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

CROOKS V. WILLIAMS.

Pathmaster—Opening streets—Trespass—Limitation of action—C. S. U. C., ch. 126.

Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land, made by a former owner, and found in the registry office; but it was not marked registered or filed, no sale was shewn to have been made according to it, and the streets had never been opened or used.

Held, that defendant was not acting within his jurisdiction, and was liable in trespass.

The act complained of was done on the 5th November, 1874, and the action was commenced on the 5th May, 1875: *Held*, in time.

DECLARATION: That the defendant and certain other persons, under his order and directions, maliciously, and without reasonable and probable cause, broke and entered certain land of the plaintiff called the west half of Lot 10 in the 11th concession, western section, of the township of Wellesley, and threw down certain fences of the plaintiff on the said land, &c., and committed other unlawful trespasses thereon, to the great damage, &c.

Pleas: 1. Not guilty—By Con. Stat. U. C. ch. 126, secs. 1, 10, 11, 20 (Public Act), and 36 Vic. ch. 48, sec. 372, subsec. 2 (Public Act) O.

2. Land not the plaintiff's.

3. That at the time of the alleged trespasses there ought to have been of right highways over the said land: that the plaintiff erected fences where said highways ought to have been; and that defendant, as overseer of highways for the township, within the execution of his duty, removed the fences, doing no unnecessary damage.

Replications: 1. Issue upon the first and second pleas.

2. To the third plea, that the highways referred to were highways laid out upon a plan of the plaintiff's land made by a former owner: that the plaintiff afterwards acquired the land without any reservation in respect of the said alleged highways, which had never been opened or used for public travel, &c., but the same have always since they were so

laid out (being a period of more than twenty years), before the time when, &c., been used and enjoyed as of right by the plaintiff and the former owners of the land, &c.

The defendant joined issue.

The cause was tried at the last Fall Assizes for the county of Waterloo, before Gwynne, J., and a jury.

It appeared that the action was commenced by writ of summons, issued 5th May, 1875.

Plaintiff acquired title to the land by deed dated 22nd February, 1872. It was made by one Owens, who was then in possession of the land. The deed was for 100 acres of land. It was situate partly within the village of Linwood. The village is not incorporated.

Portions of the plaintiff's lot were included in a plan of the village deposited in the county Registry office. There was nothing to shew when or how it came into the office. The plan, in so far as the land in question was concerned, was not marked, registered, or filed.

There was no by-law of the township providing for the opening of the streets, or other act of the township assenting to the dedication if any by the owners of the land.

It was sworn that the inhabitants of the village, with three or four exceptions, were opposed to the opening of the streets.

On 5th November, 1874, the defendant and nine others pulled down two board fences, five rail fences, and ploughed up the plaintiff's meadow and orchard land, for the purpose, as he said, of opening up some of the streets indicated on the plan.

Before defendant lifted a board, the plaintiff warned him and threatened him with law, but defendant said he did not care for the plaintiff; he was bound to open the streets, and would do so, and did do so.

Plaintiff gave defendant a letter warning him against his conduct, but defendant put it in his pocket, saying he would read it when he had time, and, notwithstanding, continued to pull down the fences.

Some of the defendant's followers hesitated to go on

with him, and he said, "You are a set of cowards. I shall fine every man that does not help me to open the streets."

Before defendant commenced, he received a telegram from the Crown Attorney at Berlin to the effect that registered streets, must be opened before the then next December Sessions.

There was a dispute as to what this telegram meant. Defendant thought he was bound to open them before the December Sessions took place; others thought that they could only be opened by and at the Sessions.

On 5th November, 1874, before the work of opening the streets was commenced, a further telegram was sent to the Crown Attorney asking him if the streets could be legally opened on that day.

Defendant did not wait for the answer, which was, that the only way to compel parties to open streets was to indict them for nuisance at the Sessions.

Defendant was at the time pathmaster of the township, but had no authority, by resolution or other act of the council, to do what he did.

His conduct, according to the evidence, was defiant and reckless.

Notice of action was served on him on 3rd April, 1875.

Counsel for the defence, at the trial, at the close of the plaintiff's case, objected:

1. That the notice of action was not sufficient.
2. That the action was not brought in time, as the trespass was on 5th November, 1874, and the writ not issued till 5th May, 1875.

The parties agreed that there should be a verdict for the plaintiff for \$15, if the Court should be of opinion, on the evidence, that the action would lie, and that the objections taken were not fatal.

The learned Judge thereupon proceeded to enter a verdict for plaintiff for \$15, as if the cause were tried without a jury.

Defendant's counsel then urged that if defendant acted in the *bonâ fide* belief that he had a right to do as he did by virtue of his office of pathmaster, no action would lie.

The learned Judge expressed his opinion to be, that on the evidence defendant had no right to do as he did as pathmaster or otherwise, and that his belief that he had the right could not give him the right nor defeat the plaintiff's right of action for the wrong of which he complained. It appeared to the learned Judge that the last objection went rather to the damages than to the cause of action; and as the amount of damages was agreed on at \$15, which the learned Judge thought small enough, he ruled there was nothing in the objections. He was inclined to think that the objection as to the action not having been brought in time was good, but, upon the whole case, entered the verdict for \$15, subject to the opinion of the Court on the evidence and the objections.

During Easter term, May 16, 1875, *Alexander Millar* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit or verdict entered for the defendant, pursuant to leave reserved at the trial and to the Law Reform Amendment Act, upon the grounds, among others, that the defendant, in doing the acts complained of, acted *bonâ fide* as a pathmaster within his authority, and, even if he exceeded his powers, is within the protection of Consol. Stat. U. C. ch. 126: that the notice of action was not sufficient under the statute, in that it did not disclose at whose suit the action therein mentioned was to be brought, and that the action was not brought within the time limited by the statute.

During this term, September 2, 1876, *King* shewed cause. It was not shewn that defendant acted *bonâ fide* in what he did, and so far as there is any finding on the point, it is against his *bona fides*: *Neill v. McMillan*, 25 U. C. R. 485. The notice of action was sufficient. [*D. B. Read*, Q.C., for defendant, admitted the notice of action to be sufficient.] And the action was commenced in sufficient time: *Hardy v. Ryle*, 9 B. & C. 603.

D. B. Read, Q.C., contra, *Millar* with him. Defendant is a public officer and entitled to notice of action. He acted

within his jurisdiction. It was necessary for the plaintiff to allege and prove that defendant acted maliciously and without reasonable and probable cause; and there was no evidence to support such an allegation: Consol. Stat. U. C. ch. 126, sec. 1; *Davis v. Williams*, 13 C. P. 365; *Denison v. Cunningham*, 35 U. C. R. 383.

September 26, 1876. HARRISON, C. J.—Assuming, without deciding, that a pathmaster is entitled to the protection of Consol. Stat. U. C. ch. 126 (*a*), it appears to me that the defendant has received all the protection which the Act affords, and is, notwithstanding, liable to pay the small amount of damages recovered against him in this action.

It is seldom that we find in a Court of justice a defendant who acted so blindly and recklessly as the present defendant, and who can shew so little justification for his conduct.

There was no satisfactory evidence to establish that the plan of the village of Linwood was, as regards the lands of the plaintiff, so lodged with the registrar as to make it binding under sec. 75 of 31 Vic. ch. 200, as amended by 35 Vic. ch. 29, O.

But, conceding that it was duly filed and registered, it is declared by sec. 77 of that Act that in no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any other person, unless a sale has been made according to such plan or survey; and there was no evidence, as regards the plaintiff's land, of any sale according to such plan or survey.

It is no part of the duty of a pathmaster or overseer of highways, without instructions of any kind from the municipal council, to take upon himself to decide the question of highway or no highway, and blindly to act upon his own decision. See *Regina ex rel. McMullen v. The Corporation of Caradoc*, 22 C. P. 356.

(a) See *Helliwell v. Taylor*, 16 U. C. R. 279.

If he attempt to do so, he acts at his peril, and if in the wrong, deserves to be punished in damages for his impertinence.

It does not appear to us that defendant was acting within his jurisdiction in doing what is proved against him.

This being so, it is unnecessary for the plaintiff, under the statute, either to allege or prove malice and want of reasonable and probable cause.

For an act done by a public officer in a matter of which he has not jurisdiction, or in which he has exceeded his jurisdiction, the remedy is trespass: Consol. Stat. U. C. ch. 126, sec. 2.

The count here, although containing an allegation of malice and want of reasonable and probable cause, is really a count in trespass.

Where a public officer either acts without jurisdiction or in excess of jurisdiction, he is nevertheless entitled to notice of action,* and to claim that the action against him shall be commenced in six months, unless the *bona fides* of his conduct be disproved: *Neill v. McMillan*, 25 U. C. R. 485.

There is much in this case to disprove the *bona fides* of the defendant's conduct; but, waiving it, we think he is not entitled to succeed on any of the objections taken in the rule.

Where his conduct is illegal, his belief that it was legal can afford him no defence; it only entitles him to the protection of Consol. Stat. U. C. ch. 126, such as notice of action, action to be brought in six months, &c.

The objection to the notice of action stated in the rule is, that it does not declare at whose suit the action therein mentioned was to be brought. The notice states that the action will be brought in the name of "Robert Crooks the younger, of the said township (Wellesley), farmer." This, according to *Neill v. McMillan*, 25 U. C. R. 485, although not giving the lot and concession, is a sufficient notice of action. Mr. Read, therefore, at the argument, rightly abandoned this objection.

The objection that the action was not commenced in sufficient time is of no greater weight.

The Consol. Stat. U. C. ch. 126, sec. 9, provides that "No action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six months next after the *act* complained of."

The English Statute 24 Vic. ch. 44, sec. 8, enacted that "No action shall be brought against any justice of the peace for anything done in the execution of his office unless commenced within six calendar months after the *act* committed."

In trespass for false imprisonment, where plaintiff was discharged from custody on 14th December and the writ of summons not issued till 14th June following, the action was held to have been commenced in sufficient time under the English statute: *Hardy v. Ryle*, 9 B. & C. 603.

Bayley, J., in delivering judgment, said, p. 607: "The question whether, in computing time from an act or event, the day is to be included or excluded, came under the consideration of Sir W. Grant in *Lester v. Garland*, 15 Ves. 248. All the authorities on the subject are reviewed by Sir W. Grant, who takes this distinction: that where the act done from which the computation is made, is one to which the party against whom the time runs is privy, *the day* of the act done may be reasonably included, but where it is one to which he is a stranger it ought to be excluded. He points out this as a distinction, which will reconcile many of the cases." See further, *Pellew v. The Inhabitants of the Hundred of Wonford*, 9 B. & C. 134; *Rex v. Justices of Cumberland*, 4 N. & M. 378; *Webb v. Fairmaner*, 3 M. & W. 473; *Blunt v. Heslop*, 8 A. & E. 577; *Williams v. Burgess*, 12 A. & E. 635; *Dowland v. Foxall*, 1 B. & Beat. 193; *Warren v. Slade*, 9 Am. 70; *Isaacs v. The Royal Ins. Co.*, L. R. 5 Ex. 296.

The rule nisi must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

AUGER ET AL. V. COOK AND DOLLER.

Saw logs—Loss of by defendants breaking the boom—Liability—Evidence—Damages—Loss of profits.

The plaintiffs had a large quantity of logs boomed in a river, and while there a drive of about 5,000 logs, belonging to one C., came past without injuring the boom, which was strong and well constructed. Defendants had a large number of logs boomed above the plaintiffs', some of which were let down at night, and in the morning were found in a jam against the plaintiffs' boom. This jam was broken up, and more of defendants' logs were let down, soon after which the plaintiffs' boom was found broken, the plaintiffs not being present, and their logs gone. They went down the stream with defendants' logs, and some were afterwards found, but about 125,000 feet were lost, and there was evidence tending to shew that they had been taken by defendants' men to a point about twenty miles away. There was evidence, also, that defendants' conduct was unreasonable in making their drive when and as they did.

Held, that there was evidence for the jury that defendants had broken the plaintiffs' boom by the undue pressure of their logs; and that defendants were liable without proof that they had actually used or cut up the plaintiffs' logs; and a verdict for the plaintiffs was upheld.

Held, also, there being no evidence that the plaintiffs could have purchased other logs at the time and place where the wrong was done, that they were entitled to recover the loss of profits, which the jury found they would have made out of the logs lost by defendants' misconduct.

TRESPASS and trover, for the seizure and sale of a large quantity of logs, claiming loss of profits. There were also the common counts for goods sold and delivered, &c.

The pleas were the usual traverses.

The issues were tried at the last Fall Assizes for the county of Simcoe, before Moss, J., and a jury.

The following were the particulars of the plaintiffs' claim:—

To 150,000 feet of logs converted by the defendants, at \$4 per thousand...	\$600 00
To profit on manufacturing the same, at \$2.75 per thousand	412 50
	<hr/>
	\$1,012 50

The plaintiffs were in partnership in a saw mill on the north branch of the Muskoka, within the limits of Bracebridge. In the winter of 1873-4 they got out 1924 pieces of timber. They ran down 1200 pieces in the spring

of 1874. The remaining 724 were left in the river and run down in the spring of 1875. Of these there were 280 pieces belonging to the plaintiffs. In the drive there were logs belonging to others. The greater portion of the logs were brought down almost to the point where the south branch joins the main stream. They reached that point between 16th and 18th May, 1875. The stream is wider than usual where they were placed. They were placed in a body and so placed as not in any manner to obstruct the navigation of the river. There were between 700 and 800 logs placed in the boom. After the plaintiffs' logs were boomed one Cockburn's drive of logs went by to the number of about 5000. They did no injury to the boom, which was made of heavy boom timber, well ironed and fastened. There was a double boom where would be the pressure of the logs coming down the river.

The defendant Cook had a very large number of logs boomed up the river above the plaintiffs' logs. The co-defendant, Doller, was his foreman. The latter, on a Thursday night, opened his boom and let out some of the logs. There was a jam of them against the plaintiffs' boom on Friday morning. A man was sent to break up the jam. He did as desired. Defendant Doller then let out some more of the defendant Cook's logs. Shortly afterwards the plaintiffs' boom was found broken and their logs gone. Their logs went down the stream with defendant's logs. Some of them were afterwards discovered, but the plaintiffs altogether lost 125,000 feet. There was evidence from which it might be inferred that the missing logs were taken by defendants' men to the mouth of the Mushquash, about twenty miles off on the other side of the lake, and in the direction of a saw mill belonging to the defendant Cook, but his men swore that none of the logs reached the mill. The logs lost were proved to be worth \$4 a thousand feet where boomed. The plaintiffs also claimed at least \$1.50 a thousand for the profits of manufacturing them.

The learned Judge told the jury that if defendants had

used and taken the benefit of any of the plaintiffs' logs, even if the original break of the jam were not in any way attributable to them, the defendants would be liable to pay for them. The jury were told to consider upon the testimony whether any, and if so how many, of the plaintiffs' logs had been taken to the defendants' mill, and been used. For them the learned Judge told the jury the plaintiffs were in any point of view entitled to compensation. But he pointed out to the jury that there was no direct evidence that any of the plaintiffs' logs had been so used. The learned Judge also told the jury that every person driving logs is bound to use the river in a reasonable manner, and not to act in disregard of the rights of his neighbours. He asked the jury to consider whether it was in consequence of the defendants' proceedings with regard to booming back their logs, and then letting them out in the manner described, the plaintiffs' booms were broken, or whether it was by accident for which the plaintiffs were accountable, and if the latter, that defendants were only liable for those, if any, actually used by them. But if defendants' proceedings caused the break the defendants were liable for the direct consequences of their act, except those which the plaintiffs might by reasonable care have prevented, that is, for the value of the logs which the plaintiffs lost without any default of their own.

As to damages, he directed the jury if in favour of the plaintiffs to find the value at the time of the conversion, and that they could, if they saw fit, allow interest on the value. This, if they were in favour of the plaintiffs on every point, would give the plaintiffs a verdict for \$530. The learned Judge also asked the jury, in the event of their finding a verdict for the plaintiffs, to say what profits the plaintiffs might have made out of the timber they lost, and to state it at so much per thousand.

Counsel for the defendants objected that there was no evidence that the defendants did break the boom, and that in the absence of such evidence the plaintiffs were not entitled to recover.

The jury rendered a verdict for the plaintiffs for \$530, and found loss of profits to be \$1 per thousand feet.

The learned Judge accordingly entered a verdict for plaintiffs for \$530, reserving leave to the plaintiffs to move to increase the verdict by \$125, and reserving leave to the defendants to move to enter a verdict for them.

During Easter term, May 15, 1876, *F. Osler* for defendants, obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit or a verdict entered for the defendants, on the grounds that there was no evidence of a conversion of the logs sued for herein, and that the defendants were not liable for the logs of the plaintiffs unless it had been shewn that the defendants had broken the boom where the plaintiffs' logs were contained; and that when the plaintiffs' logs became, without fault on the defendants' part, mixed up with the defendants' logs, the defendants were not bound to wait till the plaintiffs separated their logs from those of the defendants, and in the absence of evidence that the defendants actually used or cut up the plaintiffs' logs the defendants would not be liable.

During the same term, May 16, 1876, *McCarthy*, Q. C., for the plaintiffs, obtained a rule calling on the defendants to shew cause why the verdict should not be increased by the sum of \$125, pursuant to leave reserved.

Both rules were argued together during this term, August 29, 1876.

McCarthy, Q. C., for the plaintiffs. The verdict is warranted by the evidence, and the amount of damages should be increased by \$125, to cover loss of profits. He referred to *Brown v. Beatty*, 35 U. C. R. 328; *France v. Gaudet*, L. R. 6 Q. B. 199; *Hinde v. Liddell*, L. R. 10 Q. B. 265; and *Mayne on Damages*, 2nd ed., 296.

Bethune, Q. C., for the defendants. There was no evidence that the breaking of the plaintiffs' boom was the act of the defendants, and at all events the plaintiffs

were not entitled to recover in respect of loss of profits. He cited *Macklem v. Durrant*, 32 U. C. R. 98; *Cole v. Buckle*, 18 C. P. 286; *Ruthven v. The Great Western R. W. Co.*, 18 C. P. 316.

September 26, 1876. HARRISON, C. J.—We cannot accede to the contention of the defendants as expressed in the rule, viz.: that in the absence of evidence that the defendants actually used or cut up the plaintiffs' logs the defendants are not liable to be sued.

If defendants broke the plaintiffs' boom and drove the plaintiffs' logs, as represented, at least twenty miles from where they were boomed, so that the logs afterwards became lost to the plaintiffs, the defendants are liable in some form of action to the plaintiffs for the wrong thus done.

It is unnecessary to consider whether trespass or trover in such a case is technically the proper remedy, for there is each count in the declaration, and if neither were sufficient an amendment to meet the facts proved at the trial would be readily allowed.

The broad contention on the part of the counsel for the defendants at the argument was, that there was no evidence for the consideration of the jury to establish that defendants broke the plaintiffs' boom.

It was not at all likely that the plaintiffs themselves, who were not present when the boom was broken, were the authors of the mischief.

There was evidence that the boom was well constructed, and so constructed as to resist the pressure of Cockburn's logs and of any logs reasonably brought down the river by others.

The fact that the boom so constructed broke when defendants' logs were being driven down the river is, under the circumstances, some evidence that the boom was broken by the undue pressure of the defendants' logs.

The learned Judge told the jury that every person driving logs down a river is bound to use the river in a reasonable manner, and that no such person is allowed to act in disregard of the rights of his neighbours.

There was no complaint of the charge in this particular, and we apprehend that the charge was free from objection. See *Crandell v. Mooney*, 23 C. P. 212, and United States decisions there cited.

There was evidence that plaintiffs' logs were so placed as not unreasonably to impede the navigation of the river, either for the purpose of driving logs or otherwise.

There was also evidence that the defendants did not act reasonably in making their drive at the time they did and in the manner they did.

The learned Judge told the jury that if the break in the boom arose from accident or cause for which defendants were not accountable, that they were only liable for what they actually got and used; and that if they found that defendants did not break the boom, and did not get any of the plaintiffs' logs, the verdict should be for the defendants; but that if defendants' proceedings caused the break then defendants were liable for the direct consequences except those which the plaintiffs might by reasonable care have prevented, &c.

It appears to us that the direction was substantially correct, and that the learned Judge would have erred had he withdrawn the case from the consideration of the jury as requested by the counsel for the defendants.

There was certainly evidence proper for the consideration of the jury, and on that evidence the jury have found a verdict on all points in favour of the plaintiffs.

The questions raised were entirely for the consideration of the jury on the evidence under a proper charge from the Bench, and as the charge was a proper one, the finding on the question of fact is one which ought not to be disturbed.

In our opinion the defendants' rule must be discharged. Next, as to the plaintiffs' rule.

This brings up the question whether, on the facts as found by the jury, the plaintiffs are entitled to recover the profits which they would have made by the manufacture of the logs of which they were deprived by the wrongful conduct of the defendants.

Loss of profits is not, by the law of England, in general recoverable in an action for breach of contract: *Hadley v. Baxendale*, 9 Ex. 341; *Cory v. The Thames Iron Works and Shipbuilding Co.*, L. 3 Q. B. 181; *Ruthven Woollen Manufacturing Co. v. The Great Western R. W. Co.*, 18 C. P. 316. But the Scotch law is different. In *Dunlop v. Higgins*, 1 H. L. 381, an appeal from a Scotch Court, Lord Cottenham took occasion to condemn the English and praise the Scotch law. He said, at p. 403: "If pig iron, (the subject matter of the action), had only risen one shilling a ton in the market, but the pursuers had lost £1,000 upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the pig iron at that increased price, but also that profit which would have been received if they part had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform, that of deciding the amount of damage which the party has suffered by the breach of his contract."

The rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, which in general excludes loss of profits as not being in the contemplation of the parties at the time the contract is made, is not strictly applicable, to actions for tort, wherein the plaintiffs should be permitted to recover full damages, so far as such damages can be fairly said to be the direct result of the defendants' wrong: *Mullett v. Mason*, L. R. 1 C. P. 559, 563.

"It may now be assumed to be the general rule, that in actions for tort where the amount of profits of which the injured party is deprived as a legitimate result of the trespass can be shewn with reasonable certainty, such loss of profits constitute, to that extent, a safe measure of damages. In these cases the rule adopted with reference to certain breaches of contract which makes the offending party liable for loss of profits, so far only as he foresaw, or should have foreseen, that particular consequence of his act, does not apply. He who commits a trespass must be held to

contemplate all the damage which may legitimately follow from his illegal act, whether he might have foreseen it or not, and so far as it is plainly traceable he should make compensation for it. To this extent the recovery of a sum equal to the profits lost, while fairly within the principle of compensation, is also within the limits which exclude remote consequences from the scale in which the wrong is weighed": *Sedgwick on the Measure of Damages*, 6th ed., p. 80, note 4.

A rule as to damages which would place a trespasser in no worse position than a purchaser of goods, would not only be unjust, but so unjust as to shock the moral sense of right and wrong.

In *Flint v. Bird*, 11 U. C. R. 444, which was an action of trespass for taking timber, the Court refused to disturb the verdict of the jury, on the ground that the damages were beyond the value of the logs taken.

Sir John B. Robinson in delivering judgment said, p. 445: "We should not go into nice calculations of the value of the timber thus plundered, in order to confine the jury to that simply as the measure of damages. It will be salutary to teach the defendants and others that they must respect private rights, and are not to assume that they may strip large tracts of land that they have no claim upon, of their timber, and that they will be protected against paying more than they would have had to pay if they had bought the logs honestly from the lawful owner."

The plaintiffs and the defendants at the time of the wrong of which plaintiffs complain were to the knowledge of each other getting out logs to be cut into lumber at a profit. Loss of profits must therefore be held to be present in the minds of the defendants when depriving the plaintiffs of their property. The case in this view would fall within the rule as laid down in *Hadley v. Baxendale* 9 Ex. 341, supposing the rule in that case to be applicable to actions of tort.

Had it been shewn that plaintiffs could, at the time and place where the wrong was done, have gone into the market

and purchased other logs for the purposes of their business it might, with some reason, have been argued that the price paid for the substituted logs would be the proper measure of damages. But there was no evidence of the kind. And in the absence of such evidence we cannot say we feel any doubt as to the right of the plaintiffs to recover against wrong-doers for loss of profits.

It was shewn to the satisfaction of the jury that but for the misconduct of the defendants, the plaintiffs would have made a profit of \$125 on the logs of which the defendants deprived the plaintiffs. It was not shewn that other logs could at that time or place be purchased by the plaintiffs with a view to the expected profit. The loss of profit, therefore, was not only the direct, but the natural and necessary consequence of the misconduct of the defendants. See *Knowles v. Nunns*, 14 L. T. N. S. 592; *Cory v. The Thames Iron Works and Shipbuilding Co.*, L. R. 3 Q. B. 181; *Simpson v. London and North-Western R. W. Co.*, L. R. 1 Q. B. D. 274; *Smith v. Green*, L. R. 1 C. P. D. 92.

We make the plaintiffs' rule absolute to increase the verdict.

MORRISON, J., and WILSON, J. concurred.

Plaintiffs' rule absolute.

Defendants' rule discharged.

McHARDY V. THE CORPORATIONS OF THE TOWNSHIPS OF ELLICE AND DOWNIE.

*Road between townships—Bridge—Duty to repair—Municipal Act of 1873,
secs. 410, 413, 416—"River."*

A stream, called Black Creek, of from 30 to 40 feet in width, with clearly defined banks, crosses the road running between the townships of Ellice and Downie, and is crossed by a bridge on that road. The plaintiff sued the two townships for injury sustained by him in consequence of this bridge being out of repair. It appeared that the county council had assumed the road as a county road by a by-law, which, before the accident, had been repealed by another by-law.

Held, that under sec. 410 of the Municipal Act of 1873, in order to make the county liable an existing by-law was necessary; and that, under sec. 416, the two townships were liable.

Held, also, following the previous judgment in this case, 37 U. C. R. 580, that Black Creek was not a river, within sec. 413.

THIS was an action against the defendants for the recovery of damages sustained by the plaintiff by reason of the non-repair of the approaches to a bridge, forming part of a road over which, it was alleged, the defendants had exclusive jurisdiction, and which, it was alleged, it was their duty to repair.

The declaration contained three counts. The pleadings will be found reported, 37 U. C. R. 580.

This Court there set aside the nonsuit which had been previously entered by Gwynne, J., and ordered a new trial.

The case a second time came on for trial before the same learned Judge, at the last Fall Assizes for the county of Perth.

The evidence was, on the second trial, more minutely taken than on the first trial, but the leading facts of the case were substantially the same as appeared on the first trial.

It was, on the second trial, proved that the county had by by-law assumed the road as a county road; but, before the accident, had by by-law repealed the former by-law.

There was some evidence to shew that the county had, after the last mentioned by-law, done work on the road and bridge in question.

The learned Judge on the second occasion tried the cause

without a jury, in order that this Court might have the whole matter of law and fact before them upon the point referred to in the former judgment.

He found that the injury sustained by the plaintiff was occasioned by the negligence of those whose duty it was to repair the bridge and its approaches, in suffering it to fall into a bad state of non-repair and a dangerous condition, and assessed the damages sustained by the plaintiff in his person (allowing nothing for the injury to the horse) at the sum of \$850, for which sum, in case this Court should be of opinion that the defendants are the parties responsible for the bridge and approaches being suffered to fall into disrepair, a verdict was to be entered for the plaintiff; but the learned Judge being, as before, of opinion, upon the evidence and the view he took of the statute, that the county council was the party responsible, as being the party, in his opinion, whose duty it was to keep the bridge, &c., in repair, rendered a verdict for the defendants, subject to the opinion of the Court upon the whole evidence, under the Law Reform Act.

During this term, September 1, 1876, *C. S. Jones* obtained a rule *nisi* to enter a verdict for the plaintiff for \$850, on the law and evidence, and pursuant to the Law Reform Act.

During the same term, *R. Smith* shewed cause, and *C. S. Jones* supported the rule. The argument and cases cited were similar to those reported in 37 U. C. R. 580.

September 26, 1876. HARRISON, C. J.—The bridge in this case is, under the Municipal Act, a part of the road: Sec. 416.

The road, of which the bridge forms a part, is situate between the townships of Ellice and Downie, and is the boundary line between these townships.

The question for decision is, upon whom the responsibility is cast of keeping a road so situate in repair.

This question must be decided by the provisions of the Municipal Institutions Acts applicable thereto.

Section 410 declares that "The county council shall have *exclusive jurisdiction* over * * every road or bridge dividing different townships, although such road or bridge may so deviate as in some places to lie wholly or in part within one township."

Section 416 of the same Act declares, that "In case a road lies wholly or partly between a * * township and an adjoining * * township * * the councils of the municipalities between which the road lies shall have *joint jurisdiction* over the same, although the road may so deviate as in some places to be wholly or in part within one or either of them."

These sections are on the face of them inconsistent.

The inconsistency is attributable to the fact that the Legislature of Ontario in 1869 changed its policy in regard to roads situate between townships, but omitted, when passing the Consolidated Municipal Act of 1873, to change the language of the old provisions of the Municipal Act so as to meet the change of policy.

Before 1869 it was the policy of the Legislature to throw upon county municipalities the burden of keeping in repair roads between townships, whether assumed by the county or not: Sec. 341 of 29-30 Vic. ch. 51. See also *Re McBride and the Corporation of the Township of York*, 31 U. C. R. 355.

By an Act of 1869 the policy was changed, so as to throw upon the adjoining local municipalities the burden of keeping in repair roads lying wholly or partly between such municipalities: 33 Vic. ch. 26, sec. 8, O.

Section 410 of the present Act corresponds with section 341 of 29-30 Vic. ch. 51.

Section 416 of the present Act corresponds with section 8 of 33 Vic. ch. 26, O.

It is thus plain that the cause of the difficulty is the fact already mentioned, that the Legislature, while carefully inserting the new provision covering the change of policy, neglected, when passing the Act of 1873, to modify the language of the old Act so as to meet the change.

If the two sections (sections 410 and 416) are so inconsistent as to be mutually destructive, the earlier section gives way to the later, which is taken, as in a will, to speak the latest intention: *Maxwell* on the Interpretation of Statutes, 46.

The later section does truly speak the latest intention of the Legislature, and for that reason, if there is no other way of overcoming the difficulty, effect should be given to it as against the former section.

But in *O'Connor v. The Township of Otonabee et al.*, 35 U. C. R. 73, this Court, reading the two sections in connection with section 431 of the Act, suggested a mode of reading the Act so as to give effect to the apparently repugnant sections.

It is to read the 410th section as modified by the 416th section, and as meaning that every road dividing different townships shall [*when assumed by the county council*] be within the exclusive jurisdiction of the county.

The rule is now to cast the obligation to repair such roads on the adjoining local municipalities.

One exception is, when the county council sees fit to relieve the local municipalities of the burthen and itself to assume it.

Section 410 should now be read as containing an exception to the general rule.

It may be that a county municipality may, like a local municipality, so assume a road or bridge on dedication by a private individual as to be obliged to repair it, although no by-law assuming it was passed: *Regina v. Yorkville*, 22 C. P. 431.

But, when a county municipality seeks to relieve local municipalities of a burthen cast upon local municipalities by the Legislature, and itself to assume the burthen, we think a by-law—that is, an existing by-law—is necessary.

The only by-law by which the county assumed the obligation of repairing this road was repealed before the cause of action in favour of the plaintiff arose.

The effect of this was, to place the burthen on the local

municipalities, where the Legislature has laid it—in other words, to bring the case within the rule, and not within the exception.

We attach no importance to the acts of control proved at the last trial to have been exercised by the county council, or members or officers of that body, over the road since the repeal of the by-law.

The only remaining question is, whether the Black Creek can, in law or in fact, be properly held to be a river within the meaning of section 413 of the Act.

That section makes it the duty of county councils to erect and maintain bridges over *rivers* forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county.

Black Creek crosses the boundary line between the townships of Ellice and Downie ; but we do not think, for reasons given in the previous judgment, that Black Creek can be held to be a river within the meaning of that section.

In the previous judgment in this case, we endeavoured to place a meaning on the word “river,” as used in that section.

To that meaning we now adhere, and, adhering to it, hold (whether the question be one of law or fact) that Black Creek is not a river within the meaning of section 413 of the Municipal Act.

In our opinion the rule must be made absolute to enter a verdict for the plaintiff for \$850, pursuant to leave reserved at the trial.

MORRISON, J., and WILSON, J., concurred.

Rule absolute. (a)

(a) This case has been carried to the Court of Appeal and argued there, and stands for judgment.

MCLEAN V. DUN ET AL.

*Mercantile agency—Representation as to credit—Action for—C. S. U. C. ch.
44, sec. 10—Measure of damages—Evidence.*

The plaintiff, a merchant in Toronto, sued defendants upon an alleged contract on their part to furnish to the best of their ability information of the mercantile standing and credit, in the communities wherein they respectively resided, of the plaintiff's customers among the merchants and traders throughout the United States and Canada, concerning whom the plaintiff should have occasion to make enquiry, in order to aid the plaintiff in determining the propriety of giving credit, &c.; alleging that he desired to ascertain the mercantile standing and credit of one W., living in Toronto, who had applied to him to purchase goods upon credit: that thereupon it became defendants' duty to exercise ordinary care and ability in ascertaining the same, and to report truly to the plaintiff the result of such enquiries: that on the 14th June, 1875, defendants reported to the plaintiff that W. had stock about \$10,000, and \$5,000 or \$6,000 in his business, and claimed to be worth \$7,000: that his character and habits were good: that he was doing a fair trade; and that his credit was good locally. Whereupon the plaintiff, believing and acting on the said report, sold goods to W. to the value of \$500; whereas W. was insolvent at the time of making the report, and on the 8th July, 1875, absconded, without paying the plaintiff.

It was proved that defendants were a trade protection society, to whom the plaintiff paid an annual subscription: that he sent a clerk for information as to W., who had applied to purchase goods from him on credit: that defendants' clerk read to this clerk out of a book the information above mentioned: that the plaintiff, twelve days after, without making any further enquiries, sold to W. \$500 worth of goods on credit; and that W. soon after absconded. The Judge found that defendants did not furnish this information to the best of their ability, and that the plaintiff did not act imprudently in not making further enquiries, though living in the same place with W.:

Held, that the plaintiff could recover although the representation was verbal only, for that the action was brought not by reason of the representation, but by reason of defendants' neglect to use due care, and for a breach of their contract.

Held, also, that the plaintiff, under the circumstances, was entitled to recover the full sum for which credit was given, though the amount of the proposed credit was not mentioned to the defendants on making the enquiry.

Held, also, that the word "customer" would include intending as well as actual customers.

The Court, though not agreeing with the verdict upon the evidence, refused to interfere on that ground.

THIS was an action for recovery of damages against a firm carrying on the business of Mercantile Agents or a Trade Protection Society.

The first count of the declaration alleged that before the making of the contract hereinafter mentioned the plaintiff was engaged in business as a merchant in the city of Toronto, and the defendants agreed with the plaintiff that they would, during a year from the time of payment of \$75 by the plaintiff to the defendants, "furnish to the best of their ability information of the mercantile standing and credit (in the communities wherein they respectively resided) of the plaintiff's customers among the manufacturers, merchants and traders throughout the United States and Canada," concerning whom the plaintiff should have occasion "to make enquiry, in order to aid the plaintiff in determining the propriety of giving credit." And that on the 6th October, 1874, the plaintiff paid the \$75, and retained and employed the defendants to procure the said information, and while the contract was in force the plaintiff desired to ascertain "the mercantile standing and credit of Ernest M. Wilson, residing at and doing business in the city of Toronto, who had applied to the plaintiff to purchase goods from the plaintiff upon credit," and the plaintiff applied to the defendants to furnish the said information, and thereupon it became the duty of the defendants to exercise ordinary care and ability in ascertaining "the mercantile standing and credit of the said Ernest M. Wilson" and to report truly to the plaintiff the result of their enquiries. And that on the 14th June, 1875, the defendants reported to the plaintiff that the said Ernest M. Wilson "had stock about \$10,000 and \$5,000 or \$6,000 in his business, and that the said Ernest M. Wilson claimed to be worth \$7,000: that his character and habits were good, that he was doing a fair trade, and that his credit was good locally." Whereupon the plaintiff believing the said report to be true, and acting upon the faith thereof, sold and delivered to Wilson upon credit goods to the value of \$500, whereas the said Wilson at the time of the making of the report was in insolvent circumstances, and on the 8th July, 1875, absconded from Canada without having paid the plaintiff, and without having or leaving any assets available for the payment of

the plaintiff's claim. And concluding with an averment that the defendants did not exercise ordinary care and ability in ascertaining "the mercantile standing and credit of the said Ernest M. Wilson" before making the report, but wholly neglected so to do, whereby the plaintiff lost the value of the said goods; and claimed \$2,000 damages.

Pleas:—

1. Did not agree as alleged. 2. Did not report as alleged. 3. That the plaintiff did not act on the faith of the report as alleged. 4. Plaintiff did not sell and deliver to Wilson the goods alleged. 5. Defendants did furnish to plaintiff to the best of their ability the information, &c.

The cause was tried at the Toronto Fall Assizes, before Moss, J., and a jury.

Counsel for the plaintiff opened the case to the jury by admitting that there was no writing signed by the defendants. Counsel for the defendants on this opening moved for a nonsuit, contending that a writing was necessary; but the learned Judge, although not free from doubt, allowed the case to go to the jury, reserving leave to the defendants if necessary to move to enter a nonsuit.

Leave was also given to the defendants to add a plea of no writing, if necessary.

The case then proceeded. It was then proved that the defendants carried on the business of a mercantile agency in the United States and British Provinces of North America: that they had an office in the city of Toronto, and several hundred members there: that each subscriber paid an annual sum to the defendants: that the plaintiff was one of the subscribers, paying \$75 per annum: that the defendants' business was to give information to subscribers about the credit and standing of persons in business as merchants, manufacturers, or traders: that defendants took various means of getting information: that it was not unusual to ask a man himself as to his affairs: that information thus obtained was generally corroborated before being used; and that search was made in the various public offices for mortgages, executions, &c.

In consideration of the defendants agreeing to furnish to the best of their ability information of the mercantile standing and credit (in the communities wherein they reside) of their customers among manufacturers, merchants, traders, &c., throughout the United States and British Provinces of North America concerning whom subscribers have occasion to make enquiry in order to aid themselves in the propriety of giving credit, the subscribers (according to a memorandum in a book distributed by the defendants among subscribers) employed the defendants to procure and furnish the information, and undertook to receive the information on certain special conditions as to secrecy, &c., not necessary to be detailed.

The plaintiff in June, 1875, was a wholesale leather dealer doing business in the city of Toronto. Ernest M. Wilson, a boot and shoe maker and seller, then doing business had applied to the plaintiff to purchase about \$500 worth of leather on credit. The plaintiff before making the sale sent a clerk to the office of defendants for information about Wilson. The clerk, without giving any information as to the contemplated sale or its amount, made application on a printed form furnished to him for the purpose by the defendants.

The form was as follows :

THE MERCANTILE AGENCY

(For the Promotion and Protection of Trade.)

DUN, WIMAN & CO., Proprietors.

TELEGRAPH BUILDINGS, WELLINGTON STREET.

Give us in confidence, and for our exclusive use and benefit in our business, namely, that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility &c., of

Name..... E. M. Wilson
Business..... Shoes.
Town..... Toronto.
County.....
Province.....

D. McLeanSubscriber.

Subscribers to sign the above themselves.

No. 168

Toronto, June 10th, 1875.

The clerk of the defendants on receipt of the requisition, according to the testimony of the plaintiff's witness, read to him out of a book that Ernest M. Wilson was the son of David Wilson: was formerly in partnership with one Philips: that he had \$10,000 of stock: that he had \$5,000 or \$6,000 in the business: that he was worth \$7,000: that he mostly dealt in United States goods: that his character, habits, and credit were good.

The information which the defendants' clerk admitted to have given, was that the stock was about \$10,000 in value: that Wilson owned no real estate: that he had \$5,000 or \$6,000 in the business: that he claimed to be worth \$7,000: that his character and habits were good: that he was doing a fair trade, and bought mostly United States goods; but he denied that he gave any information to the effect that Wilson's credit was good locally.

The plaintiff, on the strength of this information, on the 22nd June, 1873, without making any further enquiry, supplied Wilson with goods to the value of \$524.17 on a credit of four months.

Wilson, in the following month of July, absconded from Canada. He left by the steamboat City of Toronto, and told a person that he met on board the steamboat that he was going to New York to buy goods, and had \$7,000 with him.

It was proved that Wilson, up to the time he absconded, had a good bank account, always having a considerable balance in his favour, and never requiring any discounts.

On the other hand, evidence was given to shew that his habits of life were not good, that his stock was not worth \$10,000: that he was from time to time sacrificing goods by auction, and was at no time a good business man.

Some witnesses, including his father and his banker, considered him in good credit, others, including some in the same line of business, were of a contrary opinion. The defendants gave the sources of their information, and it was admitted that they had acted honestly and in good faith.

The learned Judge left to the jury the following questions :

1. Did the defendants, who are persons engaged in the mercantile agency business, furnish to the best of their ability information to the plaintiff of the standing and credit of E. M. Wilson.

2. Did plaintiff act as a prudent man in not making any further enquiries, in view of the facts that Wilson resided and carried on business in his immediate neighbourhood and was well known in the city, and that the goods were not furnished for a fortnight after the application.

The jury answered the first question in the negative and the second question in the affirmative.

The learned Judge, on this finding, entered a verdict for the plaintiff for \$524.17, reserving leave to defendants to move to reduce the verdict to nominal damages or to enter a nonsuit.

During Hilary term, February 10, 1876, *J. H. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, or why the verdict should not be reduced to one shilling, on the grounds that the plaintiff, if entitled to any damages at all, was entitled to but one shilling; or why a new trial should not be had on the law and evidence.

During this term, Monday, August, 28 1876, *Bethune*, Q. C., *S. R. Clark* with him, shewed cause. The verdict is warranted by the evidence. No writing is necessary: *Lyde v. Barnard*, 1 M. & W. 101; *Devaux v. Steinkeller*, 6 Bing. N. C. 84; *Swan v. Phillips*, 8 A. & E. 457; *Lloyd v. Perry*, Law Times, 7th August, 1875, p. 269; and defendants were responsible for all the consequences of their negligence, at all events up to the value of the goods sold by the plaintiff: *Wallace v. Swift*, 31 U. C. R. 523; *Story on Agency*, 7th ed., sec. 200, note; *Guthrie v. O'Connor*, 36 U. C. R. 372; *Mayne on Damages*, 2nd ed., 7, 40, 412, 413, 414, 415, 416; *Knowles v. Nunns*, 14 L. T. N. S. 492.

J. H. Cameron, Q. C., M. C. Cameron, Q. C., with him, supported the rule. The contract alleged was not proved. The action was in truth on an assurance as to credit, and so required a writing under Consol. Stat. U. C. ch. 44, sec. 10 ; and if damages were recoverable, in the absence of notice to the defendants of the amount the plaintiff proposed to sell to Wilson the damages could only be nominal: *Stevenson v. The Montreal Telegraph Co.*, 16 U. C. R. 530 : *Kinghorn v. The Montreal Telegraph Co.*, 18 U. C. R. 60.

September 26, 1876. HARRISON, C. J.—The defendants not only deny the contract alleged, but deny that they made any such report or representation as alleged.

The report or representation alleged is, “that the said Ernest M. Wilson had stock about \$10,000 and \$5,000 or \$6,000 in his business, and that the said Ernest M. Wilson claimed to be worth \$7,000 : that his character and habits were good : that he was doing a fair trade, and that his credit was good locally.”

The defendants insist that unless this representation or report be proved by writing signed by the defendants there is in law no such representation or report as alleged—in other words, that the report is a representation or assurance within the operation of sec. 10 of Consol. Stat. U. C. ch. 44, intituled “An Act respecting written promises and acknowledgments of liability.”

It declares that “No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, goods, or credit thereupon, unless such representation or assurance be made in writing signed by the party to be charged therewith.”

This section is almost a literal transcript of the English statute 9 Geo. IV. ch. 14 sec. 6, commonly called Lord Tenterden’s Act, intituled “An Act for rendering a written instrument necessary to the validity of certain promises and engagements.”

The only marked difference between the two enactments is, the use of the word "thereupon" in our Act before the words "unless such representation or assurance be made in writing," &c., instead of the word "upon" in the English enactment.

The word "upon" used in the English statute, as pointed out by Lord Abinger, in *Lyde v. Barnard*, 1 M. & W. 101, 123, was a mistake. That learned Judge there said, "the manuscript of the clause most probably contained the word thereupon."

The framer of our Act probably had that decision before him, and has made the necessary correction by substituting the word "thereupon" for the word "upon."

Lord Tenterden when framing the English statute no doubt, as pointed out by the learned Judges, in *Lyde v. Barnard*, had the Statute of Frauds before him.

In the words of Lord Abinger, in *Lyde v. Barnard*, 1 M. & W. 101, at p. 122, "Some of his words are adopted from that statute, and where he has repudiated the words before him and adopted others, he seems to have done so with a view not to narrow, but to extend the remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation and assurance the party making it intended that other person to obtain money, goods, or credit."

Trade protection societies, such as that of the defendants in this case, are formed for the very purpose of making representations or giving assurances to subscribers concerning or relating to the character, conduct, credit, ability, trade, or dealings of other persons, to the intent or purpose that such other persons may obtain money, goods, or credit thereupon.

There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit that ought to be

given to persons with whom he deals, in which cases he must apply to those whose sources of intelligence enable them to give that information. Per Lord Kenyon, in *Pasley v. Freeman*, 2 Sm. L. C., 7th ed., 83.

The growing necessities of commerce have brought this and similar societies into being, and the same necessities liberally sustain them.

What was asked here was, information respecting the standing, responsibility, &c., of Wilson—in effect, an assurance as to the credit, ability, &c., of Wilson; and what was given purported to be a representation or assurance of such credit, ability, &c.

The representation falls within the very words of the statute.

The mere fact that the plaintiff paid money for the information constituting the representation or assurance cannot make the representation or assurance any the less “a representation or assurance, made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other to the intent that such other person may obtain money, goods or credit thereupon.”

The defendants, unless paid, were under no obligation to make any such report or representation as asked, but the report or representation when made—whether made voluntarily or under contract—is still a representation or assurance as to character, conduct, credit, ability, trade, or dealings, &c.

The information given was such as to lead the plaintiff, a merchant having goods to sell, to believe that Wilson, a merchant, who desired to purchase his goods to the extent of about \$500, might be trusted.

It is more than a representation of a particular fact or facts, as in *Lyde v. Barnard*, 1 M. & W. 101; it is a representation not only of particular facts, but of good local credit or general trustworthiness. Such a representation standing by itself is clearly under the operation of Consol. Stat. U. C., ch. 44, sec. 10, and so is not valid “unless in writing, signed by the party to be charged therewith.”

If the information had been given voluntarily—that is, without any obligation to do so—we have no doubt it would fall under the statute, and in our opinion it is none the less a representation under the statute because made in pursuance of a contract, or for a pecuniary consideration moving to the defendants.

We know of no case in point. The able and learned counsel who argued the case were unable to furnish us with any. The only case, *Lloyd v. Perry*, 59 L. T. 269, which they were able to find, is unfortunately not of much assistance. It was an action similar to the present; but the account of the trial gives no information on the point whether the report of the defendants was in writing or not.

In the absence of all authority, and dealing with the plain, unequivocal language of the statute, we are of opinion that the defendants are right in their contention on the point raised under the statute.

But it is not enough for defendants, in order to defeat the plaintiff's action, to shew that the representation is under the statute. The defendants must satisfy the Court, in the language of the statute, either that the action is "*upon*" the representation, or "*by reason*" of the representation.

The action here is in no sense upon the representation. The action is for a breach of contract. The contract alleged is, that the defendants would, for the consideration alleged, "furnish, to the best of their ability information of the mercantile standing and credit (in the communities wherein they respectively reside), of the plaintiff's customers among the manufacturers, merchants, and traders throughout the United States and Canada." The duty alleged is, that the defendants "would exercise ordinary care and ability in ascertaining the mercantile standing and credit" of the customers about whom enquiry is made. The breach alleged is, that the defendants "did not exercise ordinary care and ability in ascertaining the mercantile standing and credit" of the person concerning whom enquiry was made.

There is a broad distinction in personal actions between

tort and assumpsit, or such actions as arise *ex contractu* and *ex delicto*, which are founded upon contracts or wrongs independently of contract. This distinction, notwithstanding the recent changes of the law as to forms of action, is for many purposes still observed. There are many cases in which a plaintiff may, at his option, seek redress either by declaring *ex contractu* or *ex delicto*, and there are certain advantages which are incidental to the form of the procedure to be adopted from obtaining the one form or the other in particular cases. But, as said by Erle, C. J., in *Alton v. The Midland R. W. Co.*, 19 C. B. N. S. 213, 237, "Where it is necessary to resort to the substance of the cause of action, the distinction between the two has been constantly maintained." See further *Swan v. Phillips*, 8 A. & E. 457.

Where the foundation of the action is contract, although the declaration contain allegations of fraud or fraudulent representation, these need not be proved, and may be struck out of the declaration as surplusage: *Williamson v. Allison*, 2 East 446; *Chisholm v. Proudfoot*, 15 U. C. R. 203; *Thom v. Bigland*, 8 Ex. 725.

If the contract were not proved in this case, and the plaintiff for remedy were driven to resort to the false representation, he would, we think, fail for want of the writing signed by the defendants, but the substance of his declaration is, the contract, the duty arising from contract, and the breach of that duty.

While Lord Tenterden's Act requires such a representation to be in writing signed by the defendant, there is no statute which requires such a contract to be in writing.

It appears to us that while the falsity of the report may in a popular sense be said to be the plaintiff's grievance, his cause of action as spread out on this record is the neglect of the defendants "to use due and ordinary care and ability" in ascertaining the standing of the person concerning whom enquiry was made, and that "by reason" of such neglect, and not by reason of the false representation, the plaintiff in this action seeks to recover.

Looking at the situation of the parties, the business of the defendants, the necessities of the plaintiff, and the payment of money by the plaintiff to the defendants as reward for the services of the defendants, it may be fairly said that the duty alleged flows from the contract alleged. The money is paid for something, and that something is the skill of the defendants in the particular business which they have chosen. And where one contracts for the skill of another there is involved the duty on the part of the latter to use ordinary care in the particular calling or business. See per Robinson, C. J., in *Stevenson v. The Montreal Telegraph Co.*, 16 U. C. R. 530, 533, 534.

Whether defendants used this care was a question of fact on the evidence. If the jury had found in favour of the defendants on the evidence we would have been better satisfied with the verdict. But this where evidence is conflicting is not *per se* a ground for granting a new trial.

In *Hawkins v. Alder*, 18 C. B. 640, Jervis, C. J., said, p. 641: "Although I must confess, that, if I had been on the jury, I would have found the other way, I think there ought to be no rule. The jury did not take the same view that I did: but I cannot say they were so entirely wrong as to feel justified in taking the matter out of their hands. There was some evidence on both sides." See further *Creighton v. Chambers*, 6 C. P. 282; *Brown v. Malpus*, 7 C. P. 135; *Scott v. Scott*, 9 L. T. N. S. 454; *Regina v. Chubbs*, 14 C. P. 32; *Irwin v. Calwell*, 12 Ir. C. L. R. 144; *Regina v. Jones*, 28 U. C. R. 416; *Gray v. Turnbull*, L. R. 2 Sc. App. 53, 55.

It was argued by Mr. M. C. Cameron that the contract of the defendants is only to furnish information to their subscribers or customers, and that Wilson, at the time the information was given, was not a customer of the plaintiff. But we must give to the word "customers" a reasonable interpretation, and one as nearly as possible in accordance with the expressed intention of the parties. The information would be required as much in the case of an intending customer as an actual customer. Indeed it would be more requisite in the case of an intending than an actual

customer. For these reasons we think the word "customers" as used in the notice in front of the book furnished to each subscriber, means intending or actual customers. Upon the whole, dealing with the pleadings as if all necessary amendments were made and dealing with the case as if all necessary rules were moved, we see no ground on which we can in point of law set aside the verdict.

All that we have left is the question as to the measure of damages.

The question of the measure of damages is one that has produced more difficulty than perhaps any other branch of the law: Per Wilde, B., in *Gee v. The Lancashire & Yorkshire R. W. Co.*, 6 H. & N. 211. See also *Rowley v. London & North Western R. W. Co.*, L. R. 8 Ex. 221.

Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. Per Martin, B., in *Wilson v. The Newport Dock Co.*, L. R. 1 Ex. 177, 190.

It was insisted that as the plaintiff did not at the time he was procuring the information from defendants give them notice of the amount of goods which he proposed to sell to Wilson, that the defendants are not responsible for anything more than nominal damages; and in support of this contention *Stevenson v. The Montreal Telegraph Co.*, 16 U. C. R. 530, and *Kinghorn v. The Montreal Telegraph Co.*, 18 U. C. R. 60, were cited.

These were actions against a telegraph company for neglect to forward a particular message of great importance to the plaintiff, but the importance of which the plaintiff neglected to mention to the defendants at the time he delivered the message to the defendants to be forwarded.

In such a case it is only reasonable that in the absence of notice of the special circumstances defendants should not be responsible for the special damage arising from neglect. See further *Sanders v. Stuart*, L. R. 1 C. P. D. 326.

But in the case now before us defendants could not plead

ignorance of the plaintiff's intention to give credit for some amount to the person as to whom enquiry was made. This is the real or assumed object of every person who makes such an enquiry. The question is, whether it is necessary, in order to fix the defendants with the full amount of the credit actually given, to notify them at the time of the amount of credit proposed to be given.

This question must, if possible, be determined by the application of some principle to be extracted from the many decided cases as to damages in actions for breach of contract.

The damages recoverable in an action for breach of contract are generally much more circumscribed by rules than the damages recoverable in actions for torts. See *Auger et al. v. Cook et al.*, 39 U. C. R. 537.

It is not necessary, and it would not be profitable for us, in making our enquiry as to the amount of damages to be awarded in the present case, to look at any cases earlier than the celebrated one of *Hadley v. Baxendale*, 9 Ex. 341.

In that case Alderson, B., said, p. 354: "Where two persons have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury

which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

Although it was intimated in *Boyd v. Fitt*, 14 Ir. C. L. R. 43, that the rules laid down in *Hadley v. Baxendale*, 9 Ex. 341, are laid down too strictly, that case is now accepted both in England and the United States as undoubted law in every case to which it is applicable: *Mayne on Damages*, 2nd ed., 13; and it has also been accepted without qualification or question in this Province: *The Ruthven Woollen Manufacturing Co. v. The Great Western R. W. Co.*, 18 C. P. 316.

In *Cory v. The Thames Iron Works Co.*, L. R. 3 Q. B. 181, 190, Blackburn, J., in amplification of the rules laid down in *Hadley v. Baxendale*, 9 Ex. 341, said: "The measure of damages when a party has not fulfilled his contract is what might be reasonably expected, in the ordinary course of things, to flow from non-fulfilment of the contract * * in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think pretty obvious, viz., that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that extreme mischief would follow from the non-fulfilment of his contract."

In *British Columbia, &c., Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 509, Willes, J., qualified the rule as to notice of the special circumstances, by saying: "The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it."

In *Horne v. The Midland R. W. Co.*, L. R. 7 C. P. 583, 591, the same learned Judge, Willes, J., repeated his statement of the law, and said he still adhered to it.

Similar opinions were expressed by Martin, B., Blackburn, J., and Lush, J., when *Horne v. The Midland R. W. Co.*, was in the Court of Error, L. R. 8 C. P. 131. See also *Simpson v. London and North-Western R. W. Co.*, L. R. 1 Q. B. D. 274; *Le Blanche v. London and North-Western R. W. Co.*, L. R. 1 C. P. D. 286.

The principles enunciated in *Hadley v. Baxendale*, 9 Ex. 341, will be found further discussed and applied in the following additional cases: *Smeed v. Foord*, 1 E. & E. 602; *Featherston v. Wilkinson*, L. R. 8 Ex. 122; *Hobbs et ux. v. London and North-Western R. W. Co.*, L. R. 10 Q. B. 111; *Fisher v. The Val de Travers Asphalte Co.*, L. R. 1 C. P. 511.

In *Mullett v. Mason*, L. R. 1 C. P. 559, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff placed the cow with five others, who caught the disease and died, it was held that the plaintiff was entitled to recover the value of all the cows.

The Court refused to decide whether, if the action were for mere breach of warranty and not for fraud, there could be a similar recovery.

But in *Knowles v. Nunns*, 14 L. T. N. S. 592, decided by the Court of Queen's Bench during the same year, that Court adopted the latter view. The plaintiff, upon the purchase of two oxen, told the defendant that if there was the least fear of disease he would not have them, *as he wanted to put them with his other stock* (not stating the number of his stock), whereupon the defendant replied that they were quite sound. It was held on proof that the cattle purchased were diseased, and had communicated the disease to nine other cattle, that the plaintiff was entitled to recover, on the principles of *Hadley v. Baxendale*, 9 Ex. 341, not only for the value of the two oxen but for

that of nine other beasts to whom the disease was communicated.

Blackburn, J., in delivering judgment said: "This case comes within the rule laid down in *Hadley v. Bixendale*, 9 Ex. 341, that the damage was within the contemplation of the parties, and the rule for increasing damages must therefore be made absolute."

The Court of Common Pleas has recently, in *Smith v. Green*, L. R. 1 C. P. D. 92, on similar facts arrived at a similar conclusion, without *Knowles v. Nunns*, 14 L. T. N. S. 592 being before them, and notwithstanding the unchallenged assertion of the defendant's counsel, who cited *Mullett v. Mason*, L. R. 1 C. P. 559, and asserted that "no case could be found where the same measure of damages has been awarded for a mere breach of warranty."

So long as the amount of the credit given is within the amount for which, directly or indirectly, it is said credit may be given, we see no objection to the recovery although the particular amount be not expressly mentioned at the time.

In *Knowles v. Nunns*, 14 L. T. N. S. 592, and *Smith v. Green*, L. R. 1 C. P. D. 92, the special circumstance stated, and therefore in contemplation of the parties at the time of the contract, was, that the purchaser was intending to place the cattle with other cattle, but the number of the latter was not stated in either case.

So here, although not expressly stated at the time the contract was made or information given that credit was about to be given, it was clearly in the contemplation of the parties that credit should be given, but the amount of credit intended was not stated.

In every such case where no amount is stated, the amount must be such, looking at all the circumstances, as can be said to be a reasonable amount, and such as may, in view of the circumstances, be fairly said to have been in the contemplation of the parties.

Where the contract is as here, and the information is that the person to whom credit is about to be given has a stock

worth about \$10,000 and \$5,000 or \$6,000 in his business : that his character and habits are good, and that he is doing a fair trade ; and evidence is adduced to satisfy a jury that at that time he was not worth anything like that amount, had not the amount represented in his business or anything like it : that his habits were anything but good : that his business capacity was anything but good : that, instead of doing a fair trade, he was sacrificing his goods at auction ; and that defendants by the exercise of ordinary care could have ascertained the truth ; it is not unreasonable to hold that there should be responsibility up to the amount claimed here, viz. \$525 17.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule nisi discharged (a).

(a) This judgment has since been reversed in Appeal, Hagarty, C. J. C. P., dissenting ; that Court apparently holding that the action was brought upon the representation, and therefore that under the statute a writing was necessary.

WHITE V. CURRY.

Sale of land—Action for commission—Right to recover—Statute of Frauds.

The defendant agreed with the plaintiff, an attorney, to give him \$1,000 for his trouble and commission, if he procured for him a certain hotel property for \$15,000. The plaintiff took an agreement from the vendor to sell to himself, and afterwards, with the vendor's assent, substituted one O., who acted for the plaintiff, for himself as vendee. The defendant and the vendor, through the instrumentality of the plaintiff, then came together, and the price was reduced to \$14,500. Deeds were made by O. and by the vendor to the defendant, who took possession, the plaintiff being employed by the vendor to prepare some of the papers, but he had not, as he swore, been employed by him to make the sale.

Held, that the plaintiff was entitled to recover: that the contract was not one within the Statute of Frauds; and that his acting for the vendor after the contract of sale had been made, notwithstanding the agreement for purchase in the first instance to himself, was not open to any legal objection.

ACTION for work done by the plaintiff for the defendant at his request, and for commission and reward due from the defendant to the plaintiff as the agent of and for the defendant.

Plea: Never indebted.

Issue.

The following were the particulars of the plaintiff's demand:—To amount of commission in the matter of the purchase and sale of the property known as the International Hotel and its furniture, as per agreement between the plaintiff and defendant, \$1,000.

The action was tried at the last Spring Assizes for the county of Essex, before Morrison, J., without a jury.

E. A. Clark was the owner of the International Hotel at Windsor. It was under mortgages to the amount of \$10,500. He was desirous of selling it. He gave to his son, John Clark, a power of attorney to enable him to sell.

The latter, on the 16th of December, 1875, gave to the plaintiff a writing as follows:—

"I hereby agree to sell the property known as the "International Hotel," in the town of Windsor, in the county of Essex, and all the furniture situate and being in the said hotel, as per inventory, now held by the lessee of the

said hotel, to S. A. White, Esq., subject to the said lease and mortgages, and other incumbrances on the said property, for the price or sum of twenty-one thousand dollars, payable as follows, that is to say: The mortgages are first to be deducted from the said purchase money, and the sum of two thousand dollars is to be paid in cash, and the balance is to be paid in first-class mortgages or other real estate, all payable at different periods within five years at six per cent. interest thereon respectively; a good title and clear title to be given to the said real and personal estate.

“ E. A. CLARK,

“ Per J. Clark.

“ Windsor, 16th December, 1875.”

Shortly afterwards White, with the assent of the vendor, struck out the name S. A. White as vendee, and inserted the name of “ A. Ouellette ” in lieu thereof.

Ouellette was acting for White. Ouellette obtained a deed of the property from Clark, pending the negotiations for sale hereinafter mentioned. The deed was made to him for the purpose of keeping the title free from some claims that were likely to affect it if it had remained longer in the hands of Clark.

The defendant, according to the testimony of the plaintiff, promised the plaintiff, if he procured the hotel property, excluding the furniture, for \$15,000, to pay him \$1,000 for his trouble and commission. This, according to the plaintiff's evidence, was to be paid as soon as defendant obtained possession. The defendant denied that there was such an agreement; on the contrary, he represented that the vendor was to pay the plaintiff's commission. But Ouellette corroborated the testimony of the plaintiff, and there was no corroboration of the testimony of the defendant.

It was not shewn that Ouellette had any interest in the \$1,000 commission sought to be recovered in the action.

An agreement in writing was afterwards prepared, dated 24th December, 1875, for the sale of the equity of redemption in the property by Ouelette to the defendant for the sum of \$4,500, the mortgages on the property amounting to \$10,500, but was never executed by the parties.

Clark and the defendant then, through the instrumentality of the plaintiff, came together, and the price was reduced to \$14,500 (including the mortgages on the property), at which sum the defendant purchased the hotel, exclusive of the furniture.

There was some delay about the title ; but after a time the defendant got possession of the property, and refused to pay the plaintiff any commission.

Deeds were made to the defendant both by Ouellette and by Clark.

The plaintiff, who was a solicitor, was employed by the vendor to prepare some of the papers in connection with the transfer, but swore that he was not employed by him to sell ; or before that, that he was not, so far as he could recollect, employed in any transaction.

Joseph Clark was called as a witness, and swore that after the contract of sale was made there was some dispute about the title : that he asked the plaintiff, as an attorney, to look after his interest, and told him he would pay him whatever was right, but that he was not to pay him anything for selling the property either by commission or otherwise.

It was said that although defendant had taken possession there was still some difficulty as to the title ; but the difficulty, if any, was not very clearly explained.

The learned Judge found a verdict for the plaintiff for \$1,000.

During Easter term last, May 18, 1876, *Bethune*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, pursuant to the Law Reform Act, on the ground that the plaintiff did not prove his right to recover, the contract being to pay this sum only when the defendant got possession, which defendant contends means possession with a perfect title ; and it appears from the evidence that the title is not yet completed : that the defendant has not yet got possession ; and on the ground that the plaintiff,

acting as solicitor and adviser for the vendor, did not disclose to him the fact of his bargaining for the commission from the purchaser, and cannot recover; and on the ground that even if a bargain was made it was put an end to, and the sale was carried out by the defendant independently of the plaintiff; and on the ground that the verdict is against law and evidence and the weight of evidence; and on the ground that the contract in this case was within the Statute of Frauds.

During this term, September 8, 1876, *Ferguson*, Q. C., shewed cause. It was proved that the plaintiff performed the services, for which he is entitled to be paid: *Green v. Bartlett*, 14 C. B. N. S. 681; *Cunard v. VanOppen*, 1 F. & F. 716; *Wycott v. Campbell*, 31 U. C. R. 584. The amount was payable as soon as defendant took possession in fact: *Burns v. Griffin*, 26 C. P. 61; and there was no disloyalty to the defendant or to any other person which disentitles the plaintiff from receiving his commission: *Wright v. Rankin*, 18 Grant 625. He was not agent for the vendor, nor was he his legal adviser until after the sale, and then only for the purpose of carrying it into effect.

Bethune, Q. C., contra. The finding as to the contract for payment of commission is contrary to the weight of evidence. If not, the contract is void under the 4th section of the Statute of Frauds: *Buttermere v. Hayes*, 5 M. & W. 456; *Smith v. Toombs*, 3 Jur. N. S. 72; *Cocking v. Ward*, 1 C. B. 858; *Kelly v. Webster*, 12 C. B. 283; *Smart v. Harding*, 15 C. B. 652, and other cases cited in *Jackson v. Yeomans*, 39 U. C. R. 280. See also *Dart V. & P.*, vol. i., 5th ed., p. 200. The plaintiff's position was so equivocal that even if there was a contract with defendant for the payment of commission he should not succeed: *Wyburd v. Stanton*, 4 Esp. 179; *Bollman v. Loomis*, 12 C. L. J. N. S. 150, 15 Am. Law Reg. 75; and at all events the money is not payable till defendant has possession with a good title: *Tilley v. Thomas*, L. R. 3 Ch. 61.

September 26, 1876. HARRISON, C. J.—The plaintiff sues the defendant for commission on the purchase of land by the defendant. He does not sue the defendant on a contract for the sale of land. He is not seeking to enforce against defendant any contract relating to an interest in land. The foundation of his action is a demand for services performed for the defendant at his request. The Statute of Frauds is inapplicable to such a demand. The contract is one entirely collateral to the contract for the sale of the land.

The contract sued upon may, in our opinion, be a perfectly good contract, although an oral contract. Whether there was the contract was on the evidence a question of fact for the learned Judge who tried the cause. Although the evidence was conflicting, the weight of evidence is in favour of the existence of the contract. The finding of the learned Judge is, that there was the contract. I think the evidence abundantly sustains the finding.

Then what was the contract? That defendant would pay the plaintiff \$1,000 for his trouble and commission if the plaintiff obtained for the defendant the International Hotel, exclusive of the furniture, at Windsor, for \$15,000, the same to be paid as soon as defendant obtained possession of the property.

Was the contract performed? The defendant has obtained the hotel. He obtained it for less than \$15,000. He obtained it by means of the intervention of the plaintiff. The plaintiff brought the vendor and purchaser together. The defendant procured the hotel, exclusive of the furniture, by means of the plaintiff's intervention, at less than \$15,000. This according to the cases is, if the plaintiff is not in other respects disentitled, sufficient to enable the plaintiff to recover: *Green v. Bartlett*, 14 C. B. N. S. 681; *Wycott v. Campbell*, 31 U. C. R. 584. See further *Cunard v. VaOppen*, 1 F. & F. 716; *Tribe v. Taylor*, L. R. 1 C. P. D. 505.

Was the money at the time the action was brought payable? The promise was to pay as soon as the defendant

obtained possession. He had obtained possession before action. He had obtained deeds from the only two persons who are shewn to have had any title to the property. After so obtaining possession he expended large sums of money in improving the property. We think the facts arose which under the contract made the money payable.

The action is not as between vendor and vendee. It is not an action brought by a vendor seeking to force a contract for purchase on an unwilling purchaser.

No doubt mere possession and user do not, as between vendor and vendee, deprive the vendee of his right to have a good title shewn : *O'Keefe v. Taylor*, 2 Grant 305 ; *Crooks v. Glenn*, 8 Grant 239 ; for where by the contract possession is to be given, that means possession with a good title : *Tilley v. Thomas*, L. R. 3 Ch. 61 ; *Burns v. Griffin*, 26 C. P. 61.

But after an abstract of title, and after the purchaser has deliberately accepted possession, he cannot refuse to pay the purchase money on a mere pretence that the title is not good.

Where the possession is taken after the delivery of the abstract, and not in pursuance of any special provision in the contract, it is *prima facie* a waiver of all objections appearing in the abstract : *Bowen v. Stenson*, 24 Beav. 631.

In such a case it lies on the purchaser to rebut the presumption of title : *Ib.* See further *Port of London Ship-Owners Loan and Assurance Co.*, 5 DeG. M. & G. 465.

The possession intended by the agreement between the plaintiff and defendant was a possession by the defendant as owner. Even if it involved the obtaining by the defendant of a good title, the onus is on the defendant after having taken possession, after having taken deeds from the only persons shewn to have had any title to the land, and after having spent large sums of money in the improvement of the property, to shew some defect of title by evidence more clear than anything that appears in the notes of the evidence before us.

The plaintiff having performed the services in respect of which he was to receive \$1,000 from the defendant, and the time having elapsed under the contract for the payment of the money, the plaintiff is entitled to recover, unless it appear that in the particular transaction the plaintiff was guilty of bad faith towards his principal, or that the transaction was illegal, prohibited by law, contrary to good morals, or contrary to public policy: *Wharton* on Agency, sec. 336; *Story* on Agency, secs. 330, 331, 332.

It is upon the latter principles that it has been held that where a poundage, unknown to the customer, is agreed to be paid to a person for recommending customers, the transaction is illegal: *Wyburd v. Stanton*, 4 Esp. 179.

The policy of the law forbids that a person acting as a friend and confidential adviser of a purchaser shall at the same time be secretly receiving compensation from the seller for effecting the sale: *Bollman v. Loomis*, 12 C. L. J. N. S. 150; S. C. 15 Am. Law Reg. 75.

The principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interests of his principal as far as he lawfully may: *Story* on Agency, 7th ed., sec. 210. If the seller were permitted, as the agent of another, to become himself the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, too strong for resistance in many cases by men of flexible morals or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct or even into crime. It is to interpose a preventative check against such temptations that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity: *Ib.*

This doctrine is acted upon almost every day in Courts of equity.

The settled rule in equity is, that he who is entrusted with the business of another cannot be allowed to make

such business an object of interest to himself: *Rothschild v. Brookman*, 5 Bligh N. S. 165; *The City of Toronto v. Bowes*, 4 Grant 489, 504, 530; *Cameron v. Barnhart*, 14 Grant 661; *Wright v. Rankin*, 18 Grant 625, 631. See further *Port v. Russell*, 10 Am. 5; *Board of Commissioners of Tippecanoe County v. Reynolds*, 15 Am. 245.

Hence, according to the able law writer from whom we have already quoted (Story), it is well settled—to illustrate the general rule—that an agent employed to sell cannot himself become the purchaser; and an agent employed to buy cannot himself be the seller. So an agent employed to purchase cannot purchase for himself: sec. 211.

Upon these principles it has been held that a contract made by one who acts as the agent of both parties, may be avoided by either principal: *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468. See further *Ætna Ins. Co., Re Owens*, L. R. 7 Ir. Eq. 235, affirmed, *Ib.* 424.

But the mere acceptance by the agent of an adverse interest will not preclude him from recovering commission if such acceptance be with the principal's full knowledge and consent: *Woodhouse v. Meredith*, 1 Jac. & W. 204, 222; *Morrison v. Thompson*, L. R. 9 Q. B. 480.

In the United States it has been held that the agent for two distinct parties authorized to sell land for each, who brings about an interview between the owners, which ends in an exchange in which he takes no part, is entitled to recover commission from each: *Mullen v. Ketzleb*, 7 Bush 253.

So where the agent acted only as a middleman to bring the buyer and seller together, each of whom has agreed, without the other's knowledge, to pay the middleman a commission on any contract made between them, and a contract is made between them, in which the middleman takes no part, he may recover his commission from each, although he concealed from each the arrangement with the other: *Rupp v. Sampson*, 16 Gray 398.

If it appeared in the evidence that the plaintiff in this case was, at the time of the sale, agent as well for the seller as the buyer, and that the sale was brought about through his intervention, we should, on the authorities, be compelled to give effect to Mr. Bethune's argument on this point.

But it nowhere appears that the plaintiff ever was the agent of the vendor for the sale of the property. Both the plaintiff and the vendor depose to the contrary. Both, however, admit that after the contract of sale was made, some difficulties arose as to the title, and that the plaintiff, who is an attorney, was then employed by the vendor to look after his interests, and was employed to prepare the deeds necessary for carrying out the sale. From this time the plaintiff became and was an agent of the vendor. This ought not to prevent the plaintiff recovering his commission on the contract of sale, which commission had in truth been previously earned.

The only thing equivocal in the conduct of the plaintiff is, that before making the contract for commission with defendant he had himself accepted a written contract of purchase from the vendor, and afterwards substituted the name of Ouelette for his own in that contract; but it was explained that this was done by the plaintiff for his own security—that is, for the purpose of preventing the vendor, when the vendor and vendee were brought together by the exertions of the plaintiff, assisting the vendee to cast aside the plaintiff, and making and carrying out the contract of sale independently of the plaintiff.

While we think it is better that those who are employed to sell or purchase land should not place themselves in such a position, we cannot say in this case that it is open to any legal objection.

The rule, in our opinion, should be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

CUTHBERT V. THE COMMERCIAL TRAVELLERS' ASSOCIATION OF CANADA.

Corporation—Expulsion of member—Action therefor—Libel—Privileged communication.

The plaintiff being a member and a Vice-President of the Commercial Travellers' Association, incorporated by 37 Vic. ch. 96, D., was charged with using abusive language towards the President and other members, and with improper conduct at a meeting of the directors. A committee of seven was appointed, of whom the plaintiff chose three, to investigate these charges, and four of the committee made a report finding the charges proved. This report was adopted by the association, and the directors afterwards passed a resolution expelling the plaintiff. The plaintiff appealed to the next general monthly meeting, which decided to let the appeal drop, and to sustain the action of the directors; but at a subsequent general meeting the resolution of expulsion was rescinded. The railway companies had been notified by the defendants of the plaintiff's removal, by which he was compelled to pay higher fares than if he had been a member.

The plaintiff published a paper purporting to be on behalf of the association, in which the whole matter was discussed in an address from himself, and very offensive and violent language was used towards the President and other members; and the directors, in reference to this, passed a resolution repudiating the publication as being on behalf of the association, and censuring the plaintiff in strong language for its appearance. The plaintiff having sued the association for the expulsion, and for the libel contained in the resolution:

Held, that the plaintiff could not recover: that the expulsion by the directors, without having themselves tried the matter, and without notice to the plaintiff, was informal and void: that the plaintiff therefore was not expelled, as alleged, so that there was no cause of action therefor: that any loss sustained was the loss of his employers, not his own; and that the alleged libel was privileged.

DECLARATION. First count: that the defendants, before and at the time of committing the grievances, were and are a corporation, incorporated by an Act of the Dominion Parliament passed in the 37th year of her Majesty's reign, chapter 96; and by the rules and regulations passed in pursuance thereof each and every commercial traveller duly admitted as a member of the association is, by the said Act, rules and regulations, entitled to enjoy, among other things, the following benefits, rights, privileges, and profits, namely: the moral, intellectual, and financial improvement, advancement and welfare of its members; the establishment of material and happy relations of confidence between the different commercial houses and their travellers.

or representative men ; the founding of a place of meeting, reading room, library, and organ of public expression, a cheap and satisfactory scheme of insurance ; the concessions obtained by the association from municipalities, railways, or other corporate bodies, which individually, apart from the association, commercial travellers could not expect or hope to receive ; commercial integrity, by an efficient system of reports on the standing of parties engaged in business, and of which the office of the secretary of the association is the repository ; receiving of regular information from the association relative to places visited by commercial travellers, to all parties engaged in commercial pursuits, to hotels best adapted in price, comfort, and business convenience, and to the various railways and modes of communication. And the plaintiff is a commercial traveller, and was duly admitted as a member of the association, and continued so to be a member in good standing up to the time of the committing of the grievances, and is one of the directors of the association mentioned in the Act, and at the time of the committing of the grievances was second vice-president of the association. Yet the defendants, before the commencement of this suit, and whilst the plaintiff was such member, wrongfully, and without the authority or knowledge and against the will of the plaintiff, and contrary to the said Act, rules and regulations, expelled the plaintiff from and out of the said association, and thereby the plaintiff has in consequence thereof been deprived of the rights, privileges, advantages, and benefits of the association, and has thereby suffered damage in his said business as a commercial traveller, and has thereby suffered other damage, and also has had to pay out extra expense in carrying on his said business, and otherwise in consequence thereof.

The second count, praying for a mandamus to restore him to his membership, was abandoned at the trial, as the plaintiff had been duly restored.

Third count: that the plaintiff being the proprietor, editor and publisher of a newspaper called *The Commercial Traveller*, the defendants falsely and maliciously wrote and

published of the plaintiff, in relation to said paper and the editing and publishing thereof by him, the words following, that is to say: "Moved by W. H. Rodden, seconded by J. F. Ellis, that referring to a printed paper recently issued by Mr. Cuthbert (meaning the plaintiff), described as Vol. i., No. 1, dated Toronto, July, 1875, entitled *The Commercial Traveller*, and purporting to have emanated from the association (meaning, &c.) or in its interest, that the directors of the association were never consulted as to the issue of said paper, and they (meaning the defendants) knew nothing of its publication previous to its sudden and unauthorized appearance: that the sheet alluded to is in no way or sense whatever an organ of this association, but that it is highly fraudulent in its pretensions to be such: that notwithstanding Mr. Cuthbert's professed desire and intention to advocate the getting up of a periodical by this society, he never made any move towards that object; but having certain base personal ends to accomplish, he then produced this slanderous paper (meaning, &c.), falsely representing it as having a connection with this association. This meeting, therefore, feels called upon not only to disown the scurrilous and ill-got-up sheet in question in the clearest terms, but to express its unqualified censure upon Mr. Cuthbert, its author and projector, for his conduct in attempting to deceive the public by its publication, and by circulating therein malicious falsehoods and coarse scurrility against the highly esteemed president of this association and others of its members, who have faithfully served its best interests in the recent careful and fair investigation by which the said Mr. Cuthbert was proven to have been guilty of previous conduct quite unworthy of a member of this association" (meaning thereby that the plaintiff had made false representations respecting his connection and the connection of his said paper with the association, and that he had been guilty of falsehood, and had made statements which were not true respecting the said association. And the plaintiff has been much injured thereby in his name, credit, and reputation).

Fourth count : common counts.

Pleas :—To first, second, and third counts : not guilty.

2. To first and second counts : that before and at the time of the alleged grievances therein mentioned the plaintiff had been guilty of misconduct as a member of the said association ; therefore, under and by virtue of a power and authority in that behalf contained in a lawful by-law of the defendants, the plaintiff was for the said misconduct expelled from the said association by the committee or board of management of the defendants, as they lawfully might, which is the same grievance in the first and second counts mentioned.

3. To second count :

4. To second count :

5. To fourth count : never indebted.

Issue.

The cause was tried before Patterson, J., at Toronto, at the Winter Assizes of 1876, when the plaintiff was nonsuited.

The evidence shewed that the right of a member to vote by proxy was discussed at some of the meetings of the association, on which subject the plaintiff took a part opposed to the allowance or exercise of such a right.

A very free discussion took place at these meetings, and a good deal of feeling arose on the part of one or more of the members against the plaintiff. The plaintiff was charged with acting in a manner which was not considered to be beneficial to the association. A committee of seven was appointed by the association, with the consent of the plaintiff, to investigate the charges against the plaintiff, the plaintiff nominating three of the members of that committee.

These charges were afterwards stated to be :—

1. The offensive manner and abusive language which Mr. Robert Cuthbert treated Mr. James A. Cantlie, of Montreal, at a meeting of the directors of the Commercial Travellers' Association, held on the 8th of February last in Toronto, which conduct has very materially assisted in the resignation of the Montreal directorate.

2. His improper and unjustifiable attack on the secretary, Mr. Riley, at the same meeting, when his appointment was not under consideration.

3. His violent attack on the president, W. Kennedy, Esq., at a special meeting of the directors held on the afternoon of the 12th of February.

4. His uncalled for and exceedingly insolent conduct at a meeting of the directors held on the 5th of March, when he stated that the president was deceptive, dishonourable, and unmanly.

5. That outside the association meeting Mr. Cuthbert has stigmatized the president as a liar, and a d—d liar.

A copy of the charges was sent to the plaintiff, and a time and place were named for holding the enquiry, at which time and place the plaintiff was requested to attend, and Mr. Ellis was to attend also to sustain the charges.

After several meetings of the committee were held, and after witnesses had been examined and the parties heard, four members of the committee made the following report :

To the President, Officers, and Members of the Commercial Travellers' Association of Canada :

We, the committee appointed at your monthly meeting in March last to investigate certain charges to be preferred against Mr. Robert Cuthbert, second vice-president of this association, beg leave to report :

That their first session was held as soon as charges were ready, and copies of these charges were immediately sent to Mr. R. Cuthbert and the members of this committee.

Mr. L. Cohen was selected as chairman, and Mr. W. H. Rodden kindly acted as secretary.

That, owing to request of Mr. Cuthbert for two weeks' time wherein to consider these charges, your committee were unable to assemble for duty till the 26th of March, from which time they have held three protracted and very tedious sessions, occupying respectively seven hours, four hours and twenty-five minutes, and six hours and forty minutes, total eighteen hours and five minutes. The first session was occupied by the accuser, and the two last by the accused.

That they have examined nine witnesses, and after recalling the same parties for cross-examination, besides receiving the declarations of the accuser and accused—the

written reply of the latter covering eighteen pages of letter paper; this is in addition to verbal statements and his examination of witnesses—the evidence covering thirty closely written sheets of foolscap.

That every opportunity has been afforded to both the gentlemen principally concerned to bring forward any testimony at all bearing on these charges, and we feel confident that both these gentlemen will acknowledge such to be the fact.

Finally, your committee beg to announce their unanimous finding, that after such mature deliberation as was commensurate with the importance and the delicacy of their task; the original document of charges is annexed, and disposed of as follows:—

First charge: We find that Mr. Robert Cuthbert used hasty and intemperate language towards Mr. Cantlie, and from evidence adduced before the committee (a pre-disposition on the part of the Montreal members to secede being established), we find that what transpired at said meeting between Mr. Cuthbert and Mr. Cantlie did hasten and assist the resignation of the Montreal directorate.

Second charge: We find this charge sustained, but from the fact of Mr. Cuthbert apologising to Mr. Riley, and Mr. Riley apparently accepting said apology, we consider this charge as withdrawn.

Third and fourth charges: We find both these charges fully sustained in every particular, and we regret to find no mitigating evidence in Mr. Cuthbert's defence.

Fifth charge: We find this charge sustained, and deprecate the language used as unworthy of any one, especially an officer of this association.

All of which is most respectfully submitted.

L. COHEN, Chairman.
W. H. RODDEN, Secretary.
WM. MORRISON.
L. M. LIVINGSTON.

The report was presented to the association in May, and was adopted by them on the 7th of August.

The directors of the association afterwards, on the 3rd of September, passed the following resolution:—

That as a series of charges, preferred against Mr. R. Cuthbert for his conduct as a member of the Commercial Travellers' Association, have been preferred, proved, and

adopted by the general meeting of the Commercial Travelers' Association, and a strong vote of censure passed at said meeting, Be it resolved, that he be expelled from the list of members of this association. Carried unanimously.

The plaintiff appealed from that decision :—

1. Because I had no notice of it, nor was I present at the meeting at which it was adopted.

2. Because I have been guilty of no misconduct to warrant the committee or board of management in passing such a resolution.

3. Because the action of the committee or board of management unjustly deprives me of legal rights.

The result of which was, that in November the resolution of expulsion was rescinded at a general meeting of the association.

The evidence shewed that communications from the association were sent to the railway companies, notifying them of the removal of the plaintiff from the association, and he was obliged to pay higher fares for himself as a passenger to the Great Western Railway, and higher rates for his luggage on that and on the other railways than he would have done, if he had not been removed from his membership.

The alleged libel contained in the third count was proved.

The plaintiff, in his cross-examination, said : " I published the paper produced "—*The Commercial Traveller* referred to in the alleged libel—" I did this on behalf of the members of the association ; 600 copies were issued. This was the only number issued. There were between 600 and 700 members. I wanted every member to have one. It was circulated among the members and others. I addressed the numbers myself. The intention was, that it should be a regular periodical as a commercial enterprise of mine. It was issued about the end of July, after the investigation had terminated : after the report was made, but before it was adopted. The passage in the paper, "The time has now arrived when its paper or organ of expression should no longer remain a dead letter," meant that a paper expressing the cause of the members of the association, in

view of what had happened to myself, was a necessity. I suppose I referred to the clause in the constitution about an organ as being then a dead letter. My idea was, to get up a paper which would speak in the interest of the association, and so the first paper in it is an address from the second vice-president." He also said, "I discontinued the publication of it until I obtained justice for the wrong that had been done me by the association."

The paper published by the plaintiff, and which was put in at the trial, contained an "Address to the members of the Commercial Travellers Association of Canada, by R. Cuthbert, second vice-president." It contained a history of these personal matters of the plaintiff. The plaintiff charges the president with a breach of faith with the association. He also says, "The first duty of a member is, to respect its (the society's) laws. His fitness to be a member is only conceded when he shews that respect. Sometimes he is excused on the plea of ignorance; but shame and disgrace attach to the president of a society who pleads ignorance for violating its laws. Such a president ceases to be worthy of respect and consideration. To shew respect or consideration under such circumstances for a president would be to insult the association over which he presides, and whose interests, through its laws, he is bound to protect. * * I never knew a more immoral, outrageous, and indecent violation of the proprieties of good government than that which characterized the proceedings of the monthly meeting held on the 6th of February. * * The majority that were present did not care what breaches of the law the president made, so long as he facilitated their little game."

The article also stated the president told "an untruth," because he said he had been served with an injunction not to take a legal opinion according to a resolution of the directors, when it was only a letter which was given to him, signed by two of the members, and "either he did not know the meaning of the term he employed, or, if he did, he was guilty of an untruth—either horn of the dilemma

is dishonourable." Also, "If the president has a right to insult those principles of truth, justice, and morality which are objects of the association, then I say the fate of the association is doomed." It charges, that the president "augmented his offence by appearing against me as a witness. The man who commits without shame one dirty transaction, will not scruple to repeat it. As an example of the truth of this aphorism the president of the Commercial Travellers Association stands out in bold relief. The evidence which he gave he had a purpose in giving. It was partial, one sided, in his own favour, and not the whole truth. * * The fact of the president giving evidence at all on such paltry twaddle, is very damaging to his sense of honour, if he has any (?) while it is equally damaging to his fidelity to the best interests of the association." Of the chairman of the committee, it said: "The anti-Christian spirit of the report is predominant and smacks of an origin that is not only ancient but Israelitish; yes, the writer of the report is one of the olden tribe, and his style is classic Hebrew."

Of the report it is said: "A more false and libellous report it is impossible to imagine. I cannot conceive it possible that in the Commercial Travellers' Association a number of men pretending to be men, could be found to subscribe to anything so utterly destitute of truth. Even in their trivial statements, disregard of the essential principle of truth is shewn. That which is of no moment and perfectly useless as intelligent matter of the report is disgraced by ignorance and falsehood."

It again speaks of the president's "obstinacy and stupidity as being too incorrigible to shield him from contempt and insult, and enough to make mercy swear and play the tyrant."

Other passages of the like nature were also referred to. As to the fourth count, a sum of \$10 was claimed under it for a fee which the plaintiff paid to counsel upon certain questions laid by the plaintiff before counsel for his opinion.

A resolution was adopted on the 8th of February, 1875,

at the meeting of the directors, that the opinion of two counsel should be taken on certain questions which were then submitted.

The plaintiff thought the president intended to evade taking the opinion, and therefore he laid a case before counsel. He demanded payment of the fee, which he paid to counsel for such opinion, from the defendants, which they refused to pay.

Article 8 of the defendants' by-laws providing for expulsion of members is as follows :—" The committee or board of management shall have the power of expelling any member for misconduct. The person so expelled shall have a right of appeal to the first monthly meeting of the association."

At the close of the plaintiff's case, the defendants' counsel moved for a nonsuit, on the following grounds :—

That the plaintiff could not maintain an action on the first count because the 8th by-law, on page 24 of the company's by-laws and regulations, gave the right to expel a member, who had an appeal to the full association. There had only been a removal in fact. The individual members, if they acted maliciously, might be proceeded against for the part they took in the removal, but not the association.

That the third count was not proved, because there had been no publication of the resolution by the defendants ; and the passing of the resolution was not a publication by the defendants.

If there were a publication, then it was privileged. The resolution was passed in consequence of the plaintiff's publication of *The Commercial Traveller*, which purported to be issued by the association. The resolution was passed for the purpose of the association repudiating all connection with that paper.

That the fourth count was not proved, inasmuch as the money he paid was for his own use, and not at the request of or for the defendants.

These arguments were answered by the plaintiff's counsel.

The learned Judge was of opinion the plaintiff could not recover for the \$10, because he had not paid it at the

defendants' request, and he had submitted matters to counsel to which the resolution did not relate; and that he failed also upon the first count, because the committee or board of management had the power to expel for misconduct, against which there was the right of appeal to the association: that the plaintiff did appeal, but was unsuccessful: that the board of management assumed to expel the plaintiff for misconduct, and that their judgment as to what constituted misconduct, and whether misconduct had been established or not, could not be reviewed by a jury.

As to the third count: that the resolution set out in the third count was passed by the directors of the association, which was not affirmed or in any way dealt with at any general meeting of the association; and he was not satisfied the defendants would be liable for whatever the directors might do outside of their duty as managers of the association: that if the resolution were to be deemed the act of the defendants, he did not think it had been published; there was nothing done but the passage of it, and its entry on the minutes: that until its entry it did not exist in writing, and it was not shewn to have been communicated by the defendants to any one. The learned Judge added: "I am further of opinion that it was privileged, and that there is no evidence of express malice which I ought to submit to the jury. No such evidence can be found outside of the resolution itself. The contention is, that statements are made in it defamatory of the plaintiff, and unnecessary for the professed object of the resolution; and that these are evidence of malice. On the best consideration I have been able to give, I think that—having regard to the innuendo, by which the complaint is limited to the charge as far as it touches the question of plaintiff's connection with the association, and to the right which I assume exists in a body like this to censure one of its members, as the resolution professes to do, and to the difficulty of imputing express malice to a corporation, even if the resolution complained of profess to be the act of the corporation and not, as it does, of the meeting of directors—there is nothing I can properly leave

to the jury as evidence of express malice ; and the plaintiff therefore fails on the third count.

The plaintiff's counsel accepted a nonsuit only in deference to my ruling."

The plaintiff was thereupon nonsuited.

During Hilary term, February, 26, 1876, *M. C. Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had, there having been evidence which should have been submitted to the jury.

During this term, August 28, 1876, *MacLennan*, Q. C., and *Bethune*, Q. C., shewed cause. The claim of \$10 on the fourth count cannot be supported. The plaintiff paid the money for his own benefit, and not for the defendants.

As to the first count :—There is power of expulsion under the eighth rule of the association. A special committee investigated and reported. The association adopted the report and the board of directors expelled the plaintiff. He appealed, and the association at length received him again. The plaintiff sustained no damage whatever. The extra fare he had to pay for himself and his luggage to the railway companies was not his own money, nor his own loss, but that of his employer, for whom he was traveller. The Courts will not interfere with such bodies as this association : *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63 ; *Inderwick v. Snell*, 2 Mac. & G. 216 ; *Manby v. Gresham Life Ass. Co.*, 29 Beav. 439 ; *Ross v. Harbottle*, 2 Hare 461 ; *Mozley v. Alston*, 1 Phill. 790 ; *McDougall v. Gardiner*, L. R. 1 Ch. D. 13 ; *Wood v. Waud*, L. R. 9 Ex. 190. As to the third count :—There was no publication by the defendants of the resolution alleged to be libellous : *Somerville v. Hawkins*, 10 C. B. 583 ; *Taylor Hawkins*, 16 Q. B. 308 ; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, 508 ; *Holliday v. Ontario Farmers Mutual Ins. Co.*, 38 U. C. R. 76 ; *Hart v. Gumpach*, L. R. 4 P. C. 439, 460 ; *Spill v. Maule*, L. R. 4 Ex. 232, 237 ;

Tench v. Great Western Railway, 33 U. C. R. 8. The resolution was, at all events, privileged, for it was a proper declaration of the unauthorized act of the plaintiff in attempting to force upon the members of the association, and upon others besides, a paper of his own, containing numerous libellous charges upon several members of the association, as if it were the organ of, and published by the authority of the association.

M. C. Cameron, Q. C., supported the rule. The first count is sufficient; it shews damage sustained, and the evidence supported it. *Wood v. Waud*, L. R. 9 Ex. 190, shews that a member wrongly expelled remains a member. He referred also to *Osgood v. Nelson*, L. R. 5 H. L. 636. As to the third count:—The effect of the resolution complained of is, to charge the plaintiff with attempting to deceive the public by representing that the paper issued by the plaintiff was published with the sanction of the defendants. The resolution was published by its being read at the meeting to the several members of the body who were then present; and there could be no privilege claimed here, because the defendants had forfeited it by their unwarranted and very strong expressions against the plaintiff, which shewed plainly there was malice which influenced the publication of it. There was evidence on both these counts which should have been submitted to the jury. As to the claim of \$10 under the fourth count, it is not a large sum, but the plaintiff might insist on claiming it.

September 26, 1876. WILSON, J.—The case now rests upon the first and third counts. The former is, for expelling the plaintiff from the association, causing him material and pecuniary loss; the latter is, for libel, by the publication of the resolution referred to.

The objection to the expulsion is, that the committee of management, before whom the report of the special committee got, by some means not stated, passed the resolution of expulsion without notice to the plaintiff that they were going to act upon the report, and without notice that they

were going to pass judgment upon the plaintiff, and without calling upon him to shew cause why he should not be expelled from the body.

There is the right of expulsion vested in that body by by-law of the association. The board of management had not tried the matter—a special committee had done so; but the board proceeded to pass a summary judgment in a matter they had not heard.

No doubt it is irregular and unwarranted. The matter was then before the general body. It was not referred to the board. They acted upon the fact of the report having been adopted by the general meeting, and without inquiry of any kind on their part. It was not then formally or properly before them; and they pass judgment without notice or warning to the plaintiff.

He appealed from that judgment, and it was finally reversed. The expulsion, for the reasons stated, was wholly informal and void.

The questions are: 1. Was the plaintiff ever expelled in fact or in law by such an irregular proceeding? If he were not, then the first count cannot be sustained as it stands. If he were then, 2. Is the association liable for such a proceeding, or are the respective members of the board answerable who voted for the expulsion?

The evidence shews that the plaintiff, according to the by-laws, appealed to the then ensuing general monthly meeting of the association against the decision and resolution of the board of management; and the matter was discussed at the monthly meeting in September, when, “after considerable discussion relative to the above, the feeling of the meeting expressed was, to let Mr. Cuthbert’s appeal drop, and action of the directors sustained.”

In October a notice of motion was given at a meeting of the board of management that the resolution of expulsion should be rescinded; and in November following the board of management rescinded the resolution.

The only part which the general meeting of the association took with respect to the resolution of expulsion, was,

as above stated, "to let the plaintiff's appeal drop, and to sustain the action of the directors."

As to the first question, the case of *Wood v. Waud et al.*, L. R. 9 Ex. 190, is very applicable here. There the action was brought by a member of a mutual assurance society, by the rules of which the committee of the society, who were the defendants in the action, had power if they at anytime deemed the conduct of any member suspicious, or that he was for any other reason unworthy of remaining in the society, to exclude him by directing the secretary to give notice to him in writing that the committee had excluded him from the society; after which the member was to have no claim, nor to be responsible for any loss happening after such notice. The plaintiff alleged he had insured a ship in the books of the society, and had paid the deposit, and that he was thereupon entitled to indemnity for loss happening to the ship: that the defendants well knew it, but wrongfully contriving to deprive the plaintiff of such indemnity, they did wrongfully and collusively expel him without giving him, or any one for him, any opportunity of being heard before them, and without hearing him, whereby, &c.

The Court held that, assuming the allegations in the declaration to be true, the act of the defendants in expelling the plaintiff, without giving him an opportunity of being heard, was void; and that the plaintiff therefore still remained a member of the society, and had sustained no damage.

It was doubted by two of the learned Barons whether an action would lie against the defendants for acts done by them as members of the committee, because they had the power to act on the ground of suspicion, which could not be tried; and two of them thought the declaration was bad for not alleging fraud or *mala fides*, and that the word *collusively* did not charge fraud in this case upon the facts as stated.

The cases of *Blisset v. Daniel*, 10 Hare 493, and *Innes v. Wylie*, 1 C. & K. 257, were referred to for the purpose of establishing that if the plaintiff were expelled without notice he was still a member.

If there is a cause of action in this case, did the defendants expel the plaintiff? They *sustained*, on appeal to them by the plaintiff, the action of the committee in doing so. That being an adoption of what the committee had done, and the committee being a select and smaller body of the aggregate body appointed for convenience to do the business, and deriving their power from the whole body, I am of opinion that what the committee did in the authorized discharge of their duty they did for the association, and that the defendants are answerable for it. A bill, if filed in Chancery, to compel a restoration of the plaintiff, if one had been necessary for the purpose, must have been filed against the association as a corporate body.

Is there a cause of action if the plaintiff has all along been a member of the association? The principal case above cited says not. I must say I am of opinion with Cleasby, B., in that case, that the plaintiff has a good cause of action, because of the damage it might be to him to file a bill in Chancery to procure or to establish his restoration: *Dixon v. Fawcus*, 3 E. & E. 537.

But following the authority referred to, I am obliged to say that the plaintiff cannot maintain this action. The plaintiff has sustained no pecuniary loss. The loss was that of his employer, and not his own. No other damage in point of fact was sustained by him. The whole of the alleged damage is imaginary. It is what he might have lost, but did not. There is the less regret, therefore, that the action fails; and more especially, in the face of the authorities that the Courts act most unwillingly in interfering with the internal affairs of these companies even when they are incorporated: *McDougall v. Gardiner*, L. R. 1 Ch. D. 13, citing *Foss v. Harbottle*, 2 Hare 461, and *Mozley v. Alston*, 1 Phill. 790.

If the defendants or the board of management had acted lawfully by hearing the plaintiff before giving judgment upon him, the Court would not have interfered with the discretion which had been exercised in dealing with the plaintiff. In a complaint of the kind the Court would only

have interfered if fraud had been established against the defendants, or if they had got rid of the plaintiff, not in good faith, but to accomplish some other purpose : *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63.

In *Osgood v. Nelson*, L. R. 5 H. L. 636, it was decided that the corporate body may delegate an enquiry to a committee of its members, with power to report ; and on the report being made, the corporate body may call upon the officer to answer it, and after his defence made the corporate body may pronounce their judgment without rehearing the evidence, because the reference to the committee was not an act of delegation, but a due exercise of authority by the corporation itself, inasmuch as the committee had only to take the evidence and report, and not to pronounce judgment.

I come to the conclusion the plaintiff was not expelled, as the declaration alleges he was.

If from authority I could have said the action was maintainable, I think it would have been rightly brought against the defendants.

If the plaintiff had alleged that the defendants informed the railway companies and other persons and bodies that he had been expelled, in consequence of which he had suffered loss or damage, the action would certainly have been sustainable. But then, again, there has been no loss in point of fact.

The plaintiff therefore fails upon the first count.

As to the libel count : It cannot be of any consequence to consider whether the reading and adoption of the resolution complained of in that count at a general meeting of the association was or was not a publication of the libel, nor whether the defendants as a corporation are liable upon such a resolution, or only the individual members who support and vote for it, because in any event the plaintiff must fail, as the whole proceeding was plainly a privileged matter.

There is no reason to question that the defendants, and all who supported the resolution, acted in good faith ; and

the language in which it is expressed is not at all too strong. Such language was called for by the printed publication of the plaintiff.

It might well be said the plaintiff had "certain base personal ends to accomplish" in the publication of his paper, which is called "a slanderous paper;" and it is said that the plaintiff by it "falsely represented it as having a connection with the association." And it is again called "a scurrilous and an ill-got-up sheet." The plaintiff is charged with "circulating therein malicious falsehoods and coarse scurrility against the highly esteemed president, and others of its members who have faithfully served the best interests of the association in the recent careful and fair investigation by which the said R. Cuthbert was proved to have been guilty of conduct quite unworthy of a member of the association."

The paper published by the plaintiff does declare that it is the organ of the association. If it does not so, the language is of that character that it might very fairly justify the defendants in thinking so.

The publication was for the express purpose of enabling the plaintiff to give his own version of the investigation against him to the whole members of the association. It is made the means of assailing the president of the association and other members of it who were hostile, as the plaintiff supposed them to be.

It is not likely the association could submit to have a paper of that kind attributed to them, nor that they could adopt or permit of such language as the whole publication teems with to pass unnoticed.

It became a duty to vindicate the association and the members of it who were attacked, insulted, and abused in every conceivable form. In doing that some reasonable limits must be allowed to a body and to persons so placed to express themselves with effect, and to make such a necessary declaration which shall fairly express their meaning and feelings from the manner in which they have been spoken of so publicly.

The cases referred to shew the resolution of the defendants was not expressed in too strong or too vehement language.

The case of *Hunter v. Sharpe*, 4 F. & F. 983, shews how far a person may be justified in the use of very forcible and severe language, although the defendant was merely criticising the publication of an article by the plaintiff in his profession of a medical practitioner.

Here the defendants are not taking up the cause of another or of the public generally. They are defending themselves against unworthy and opprobrious charges, against coarse and improper language, which is likely to rouse the anger and feelings of persons so circumstanced. In my opinion, it is sufficient to dispose of the case upon that ground.

It would have been better, when the resolution of expulsion was revoked, if the plaintiff had allowed *by-gones to be by-gones*, in place of beginning or continuing an action which could only maintain ill feeling in a respectable body of gentleman where harmony and kindliness should prevail, and without which the society cannot possibly accomplish the purposes of its association.

The rule will be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

O'CONNOR ET AL. V. DUNN.

Survey—Field notes of deceased surveyor—Admissibility of.

The question in dispute being the boundary between lots three and four, the field notes of a surveyor since deceased of a survey made by him in June, 1827, for one B., were tendered in evidence; in which it appeared that he then found a post which he treated as an original post between these lots. B., as appeared by the entries in the registry office, became the owner of lot 2 in August, 1827, and of lot 3 in January, 1830.

Held, admissible—if the survey were shewn to have been made for a person interested in it, of which there was evidence—as being an entry made in the course of business, and in the performance of a *quasi* public duty.

THIS case was before the Court lately, and is reported in 37 U. C. R. 430. The cause was tried again, before Patterson, J.A., at the Toronto Winter Assizes, 1876, and a verdict rendered by the jury for the plaintiffs.

At the trial the defendant's counsel tendered in evidence the field notes of Mr. Gibson, a surveyor, deceased, of a survey which he made on the 6th of June, 1827, for Mr. Boulton, in which notes it appeared Gibson then found a post, which he treated as an original post, between lots 3 and 4. Mr. Boulton, by the entries of conveyance in the registry office, became the owner of lot 2 on the 23rd of August, 1827, and of lot 3 on the 28th of January, 1830, both lots being acquired after the survey was made for him; and in Gibson's books there was an entry of the fees paid to him by Mr. Boulton for this survey. The learned Judge rejected the evidence, because there did not appear to be any privity of Mr. Boulton with either of the lots at the time of the survey made for him.

There was also evidence given by F. F. Passmore, P. L. S., that in 1853 he, with two other surveyors, Gibson and Hawkins, had been appointed arbitrators by the owners of lots 4 and 5, and that they then made surveys, and defined the line between lots 4 and 5 by their award.

During Easter term, May 17, 1876, *McCarthy*, Q.C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside as to the plaintiffs' possession and a new trial granted, because of:—1. The rejection of the evi-

dence of the entries made by the late David Gibson, P. L. S., of the survey made by him, and of the posts found by him on the making of such survey between lots 3 and 4. 2. The misdirection of the learned Judge, in charging the jury, that there was no evidence of the side road between lots 5 and 6, from which the division of the lots in question could have been made. 3. The direction to the jury, that the decision of the arbitrators as to the position of the monument or limit between lots 4 and 5 would not be evidence as to the position of said limit. 4. The direction to the jury; that the acts of ownership by Brown, in cutting the timber on the defendant's land, was not evidence of possession by him.

During this term, August 31, 1876, *M. C. Cameron*, Q. C., *J. H. Ferguson* with him, shewed cause. The chief question is, whether the evidence of the late Mr. Gibson's field notes were rightly rejected. His survey was made for a person not appearing to be then interested in any of the land there, and so his notes of survey were not admissible; but even if he had made it for a person who then owned one of these lots, it would not have been admissible: *Doe d. Hughes v. Lakin*, 7 C. & P. 481; *Bridgman v. Jennings*, 1 Ld. Raym. 734; *Valentine v. Smith*, 9 C. P. 59.

McCurthy, Q. C., supported the rule. Brown had possession for more than twenty years. Gibson's notes were admissible in evidence whether he made his survey for a proprietor of land or not. Here the registry office shewed that Mr. Boulton, for whom the survey was made, did not in June, 1827, when the survey was made, own either lots 2 or 3; but he did get a title to lot 2 in two months after. The probability is, that he was negotiating for the purchase of the lot when he got the survey made, as he got his title so soon after it. He would not have had the survey made and paid for it if he had no interest in having it made: *Poole v. Dicas*, 1 Bing. N. C. 649; *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890, 898; *Rawlins v. Rickards*, 28 Beav. 370; *Roscoe's N. P.*, 12th ed., 63; *Chambers v. Bernasconi*, 1 C.

M. & R. 347, 368; 4 Tyr. 531; *Barton v. Corporation of the Town of Dundas*, 24 U. C. R. 273.

September 26, 1876. WILSON, J.—There is no doubt there is evidence that Brown was in possession of lot 4 more than twenty years ago, cutting the timber off it. But it does not appear that he had any defined easterly limit between his lot and lot 3. The evidence is, that he cut over lots 4, 3, 2, and 1, easterly to the town line.

The learned Judge left it to the jury to say whether the division fence between lots 3 and 4, as the defendant claims it to be, was upon the original limit between these lots, and they found it was not. Upon the evidence it is impossible to say that such a finding was erroneous.

The defendant's counsel objected to the charge because the learned Judge did not direct the jury that the arbitration survey between lots 4 and 5 was evidence that the limit the surveyors, acting as arbitrators, settled upon was the original limit between these lots.

I do not distinctly see what the direction was upon that point.

The evidence of Mr. Passmore was, that "the award made or defined a line which the parties were bound by; but no monument or line was found there. I do not know that they were selected by the parties as their surveyors. I understood we were to examine the line professionally, and decide where the line 4—5 was."

The arbitrators took evidence in the case. They were not unanimous. Two of the arbitrators were in favour of the owner of lot 5, and against an equal division of land for lots between the town line and the undisputed monument between 7 and 8. The third arbitrator, Mr. Passmore, was in favour of an equal division of land between these different lots.

The objection last mentioned, and the exclusion of the late Mr. Gibson's field notes, being of the like nature, may be considered together.

I shall consider a few of the authorities on this point.

The case of *Doe d. Hughes v. Lakin*, 7 C. & P. 481, shews that a map is not receivable in evidence unless it appears that at the time it was prepared the whole of the property in dispute belonged to the person from whom both parties claim: see also *Wakeman v. West*, 7 C. & P. 479; *Bridgman v. Jennings*, 1 Ld. Raym. 734; *VanEvery v. Drake*, 9 C. P. 478.

The defendant's case is, that these notes of surveys, and the acts of surveyors in settling the limits of lots, were official duties performed in the course of a public duty; and that an entry or act done by them is receivable in evidence to establish the truth of the entry so made, or of the act so done.

Such evidence is unquestionably admissible.

In order to render a declaration admissible it must be shewn that the entry was made contemporaneously with the fact which it narrates: *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890, 897, 898. That it was made in the usual course of business by a person whose duty it was to make the whole of it: *Chambers v. Bernasconi*, 4 Tyr. 531; *Poole v. Dicas*, 1 Bing. N. C. 649. That it was made by one who was himself personally acquainted with the fact, who had no interest in stating an untruth: *Poole v. Dicas*, 1 Bing. N. C. 649. And who is since dead: *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890, 898; *Taylor on Evidence*, 6th ed., sec. 640. I refer also to *Stapylton v. Clough*, 2 E. & B. 933.

An old lease may be used to shew that by reputation a parcel of land was part of a particular manor: *Doe d. Padwick v. Wittcomb*, 6 Ex. 601, affirmed 4 H. L. 425.

In *Regina v. The Inhabitants of Bedfordshire*, 4 E. & B. 535, upon a presentment against the inhabitants of a county for not repairing a bridge, the defendants pleaded that A. was liable to repair it *ratione tenuræ*. Issue was taken on A.'s liability. Held, that evidence of reputation was admissible to prove the non-liability of the county, as a matter of public and general interest, although such evidence related also to a matter of private interest, the personal liability of A.

In *Smith v. Blakey*, L. R. 2 Q. B. 326, Blackburn, J., said, pp. 332, 333: "All the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be, to do the very thing to which the entry relates, and then to make a report or record of it. Thus in *Price v. Earl of Torrington*, 1 Salk. 285, it was the duty of the drayman to deliver the beer, and enter it in the book ;" and so in the like manner it was the duty of the other persons to do the duty, and to make the entry of it in the cases before mentioned.

It is said that the publicity of an inscription on a tombstone gives a sort of authenticity to it, and if it remains uncontradicted for a great many years it will, in the absence of evidence to the contrary, be taken to be true: *Haslam v. Cron*, 19 W. R. 968.

In this particular case the late Mr. Gibson was employed to make a survey of lots 2 and 3, and the broken fronts in this same concession.

It was his duty to search for the original posts between and upon each side of these lots; and if he could not find such posts, then to search for the nearest original post to these lots, these posts being the true and unalterable boundaries of such lots. The surveyor could not act until he had passed an examination and obtained a license from the Lieutenant-Governor, and until he had entered into a bond with sureties to the Crown for the due performance of the duties of his office, and had taken the oath of allegiance, and also the further oath, "That I will well and truly discharge the duty of a surveyor of lands, agreeably to the law, without favour, affection, or partiality, when and as often as I may be required thereto by any person or persons, or by the rule or order of any Court of justice, and which I will faithfully, and without unnecessary delay, submit to the party requiring the same, or the Court directing my duty; also a plan of survey if required. So help me God."

The chain bearers were also to be sworn when employed.

These were the provisions of the 59 Geo. III. ch. 14, sec. 5, under which Mr. Gibson performed his survey in June, 1827. There is no express mention of field notes in the statute; but a *plan* of the survey had to be furnished if required, and it would be unusual, out of the ordinary course of business, and in many cases difficult, to make an accurate plan of survey without the aid of field notes.

The general duty of the surveyor under that Act was to make and to preserve field notes. The government required their surveyors to make and to return their field notes of surveys and their plans in all cases, and it is notorious that surveyors prepared field notes of every survey they made.

Mr. Gibson was to some extent a public officer. He was duly licensed and sworn to do his duty impartially. He was employed by Mr. Boulton to discover, if he could, any of the unalterable boundaries in the concession governing the limits of lots two and three. He made field notes of such survey, and he did state therein that he found a post, which I assume means an original post, because he treated it and acted upon it as such, between lots 3 and 4 at a particular spot.

He had no interest in so stating that fact. Why then should not the field notes be admissible?

All the conditions for the admissibility of entries made by persons required to do a particular duty and to keep a record of it; and such a record or entry is surely relating to quite as important a matter, and is as necessary to be made, as that of the drayman, that he had delivered so many casks of beer; or that of the notary's clerk, that he had presented a bill; or that of the attorney's clerk, that he had served a notice to quit.

I have not referred to the fact that Mr. Boulton does not appear by the entries in the registry office to have been the owner of either of these lots at the time of the survey.

I think that it may have been left to the jury to have said, as Mr. Boulton did become the owner of lot 2 within two months after that survey, whether the survey was not

made by him as one who was interested in having the survey made. It is so improbable, too, that Mr. Boulton would have paid for a survey of land in which he had no interest of any kind.

I am of opinion the field notes were admissible in evidence for the purpose of shewing that in the course of his survey Mr. Gibson did find a post, which he considered to be an original post, at the point where his notes indicated between lots 3 and 4, according to the principles which permit entries made in the due course of business to be received.

It may be, also, that if the entry of the money received by Mr. Gibson from Mr. Boulton for this survey can be connected, that the entry would be admissible, as contrary to the interest of the surveyor.

Evidence of reputation of posts being original posts, and of the site where they stood when they are gone, is constantly received and acted upon in this country; and, in my opinion, it is properly admitted, because the surveys are of a public nature, and they indicate the unalterable boundaries represented; and any such post between private lots may, as it frequently does, determine the true site of the public roads in that neighborhood.

The same reason will authorize the reception of the arbitration survey as to what was done by the three surveyors at that time; if they, as I rather assume they did, acted as surveyors and not as arbitrators.

In granting a new trial in this case before, on page 433 of the report, I said: "As to the exclusion of the field notes of Gibson's survey in 1827, they were rightly excluded, because it was not shewn the survey was made for the persons who were the owners of lots 3 and 4 at that time."

A private survey may be received as an admission of persons in privity with those against whom they are tendered.

Here it is not that the defendant wants to prove the private survey made for Mr. Boulton, but that in the course of that survey Mr. Gibson, as a surveyor and public officer in the

discharge of a *quasi* public duty under the statute, acted upon a particular post as an original post, and as one of the unalterable statutory monuments for making the division between lots. In such a case it is not necessary that he should have been surveying for the owners of the lots between which he found such post. It is sufficient he was then in the performance of his duty making a survey, in which it was necessary he should survey the place where he found the post. He might, for instance, have been surveying between lots 5 and 6, and to make it properly he might have had to go easterly to the line between 3 and 4. If so, what he did do and find at the line between lots 3 and 4 may be good evidence in a suit afterwards between the owners of these lots, although he was then making a survey between and for the owners of lots 5 and 6. It is not claimed that such an entry is conclusive of the fact stated, by any means, but merely that the entry shall be accepted in place of the *vivâ voce* testimony of the surveyor who made it, because he has since died.

What I probably intended to say in the above passage is, that the notes were rightly excluded because it was not shewn the survey was made "for a person who was interested in the survey;" and Mr. Boulton apparently was a person who was not interested in it, as he did not own any land there at the time, so far as we know. But from what I have already said upon that point, the fact of his having been so interested should have been left to the jury. The passage so amended would read rightly. As it stands at present it is not a correct view of the law, and never has been the opinion which I entertained on the subject.

To enable the notes of the surveyor to be received at the trial, it should properly be shewn, as the first step, that Mr. Gibson was employed to survey by some one interested in having that survey made: *Bright v. Legerton*, 7 Jur. N. S. 559; *Smith v. Blakey*, L. R. 2 Q. B. 326, 329.

Upon that fact being shewn, I am of opinion that the entry he did in his performance of that duty is admissible in evidence.

I incline to think there is already evidence of that fact. If not, it may be better established by further evidence than the mere entry in the books, debiting Mr. Boulton for the survey and crediting him with the payment, as that entry may not be sufficiently connected with the survey of this lot, or of any land in that neighbourhood.

It is important to consider that under the present Survey Act, Consol. Stat. U. C. ch. 93 sec. 4, it is a misdemeanour wrongfully to deface, alter, or remove any post planted by any surveyor to mark the limit or boundary of any lot, &c., and that surveyors are now expressly bound to make field notes of all surveys.

I fear if the parties cannot come to terms, which certainly it seems very desirable they should do, that there must be a new trial ordered, because of the exclusion of evidence.

I regret this very much, because it can not be said the verdict is not quite right upon the merits, as two juries have found in the same way.

It is really a question for the jury, and if they had found the other way I should equally have been against interfering with the defendant.

HARRISON, C. J., and MORRISON, J., concurred.

Rule absolute for new trial.

JEX ET AL V. HICKS ET AL.

Ejectment—Title.

In ejectment the plaintiffs claimed under a deed from the sheriff. Defendant J. D., by leave of the Court, defended as landlord of H., the other defendant, and besides denying the plaintiffs' title, claimed under a deed from M. D. and P. D.

The plaintiffs proved judgments and executions against P. D. and M. D., and a sheriff's deed thereon on 3rd January, 1873, to F., who conveyed to the plaintiffs in 1874. H., being called by the plaintiffs, proved that he occupied under P. D., under a lease made by him on January 7th, 1873, and that P. D. had been on the lot several years; but a deed was proved from M. D. and P. D. to defendant J. D., dated and registered in 1858.

Held, that this deed shewed title out of P. D., the execution debtor, under whom the plaintiffs claimed, at the time of the judgment and execution: that the defendant J. D. was entitled to set up such defence; and that it was necessary for the plaintiffs to rebut the title thus shewn.

EJECTMENT for the west half of lot 5, in the third concession of Percy, in the county of Northumberland. The plaintiffs claimed title under a deed from the sheriff of the united counties of Northumberland and Durham. There was no claim by the defendant John Hicks, but the defendant John Dunigan, [by order had leave to defend the action as landlord of Hicks, and besides denying the title of the plaintiff claimed title in himself to the lands, under a deed from Michael Dunigan and another deed from Patrick Dunigan to him John Dunigan.

The case was tried before Moss, J., at the last Spring Assizes at Cobourg.

At the trial Hicks was called by the plaintiffs, and he stated that he occupied the premises under Patrick Dunigan, who put him in possession under an agreement or lease, dated 7th January, 1873, for a term of years, by which he gave him the use, &c., of the premises, upon certain conditions, with a proviso that if he (Hicks) was disturbed by any other claim except Patrick Dunigan, then Hicks was to give up possession, pay the rent, for the time being he occupied the premises, then the article of agreement or lease was to be null and void: that he paid a year's rent, and then declined to pay any more until indemnified: that Patrick had been on the lot a number of years: that.

defendant John Dunigan was on it one summer many years ago: that defendant Dunigan sued him for rent.

Exemplifications of two judgments were put in against Patrick Dunigan and Michael Dunigan. The deputy sheriff proved receiving writs of execution under the judgments, and the advertising of the lot in question, and selling the interest and title of Patrick Dunigan and Michael Dunigan in the premises on the 25th of September, 1872.

A sheriff's deed to purchaser, James Flannigan, dated 3rd of January, 1873, and deed from Flannigan to Jex, the plaintiff, dated 2nd of March, 1874, were proved by plaintiff.

On cross-examination, the plaintiff said he once had a deed which he got from John Dunigan, produced, dated 23rd of November, 1858, registered following day—Michael and Patrick Dunigan to John Dunigan, defendant, in fee, conveying the premises in question; he knew the witness to it, who was dead.

Upon this evidence the plaintiffs rested their case.

On the part of the defence, the deed last above referred to was proved, as shewing no title in the execution debtor, Patrick, at the time of the judgments or executions, and that the plaintiffs took nothing under the sheriff's deed.

The plaintiffs' counsel submitted that no defence was proved, and asked the learned Judge if he should call rebutting evidence.

The learned Judge ruled that as Patrick was in possession and under the lease to Hicks, and defendant Dunigan claimed as landlord of Hicks, that evidence in reply need not be called, and that the plaintiffs were entitled to a verdict: that the seizin of Patrick should be presumed from his possession, and that such presumption was not rebutted by proving that in 1858 he and his brother made a deed to defendant John; and a verdict was entered for the plaintiffs.

In Easter term May 18, 1876, *Hector Cameron*, Q. C., obtained a rule to set aside the verdict, and to enter a verdict for defendant, on the ground that the evidence shewed that no title to the land in question passed to the plaintiffs under the sheriff's sale.

In this term, August 31, 1876, *Armour*, Q. C., shewed cause and cited *Doe d. Knight v. Smythe*, 4 M. & S. 343; *Doe Manvers v. Mizem*, 2 Moo. & R. 58; *Craven v. Smith*, L. R. 4 Ex. 146.

Hector Cameron, Q. C., supported the rule, and cited *Doe Pettitt v. Raymond*, 6 U. C. R. 501; *Nolan v. Fox*, 15 C. P. 565; *McLeod v. Austin*, 37 U. C. R. 443; *Gilmour v. Wallbridge*, 22 C. P.

September 26, 1876. MORRISON, J.—These plaintiffs are not claiming a right to the possession of the premises as landlords of the defendant, Hicks, but on the ground that Hicks is not entitled to retain possession, his lessor, Patrick Dunigan, having no title at the time he got his lease, as they had acquired the title of Patrick, if any, which he had at the time of the making of the sheriff's deed, 3rd January, 1873, to their grantor, and that the lease Hicks held had no validity as against the plaintiffs. It is, however, quite consistent that Patrick may have acquired a new right to the possession, or that the defendant John Dunigan had become Hicks' landlord, and that he was in under him. The defendant John Dunigan obtained a Judge's order allowing him to come in and defend as landlord of Hicks, and I think we may fairly assume that the materials upon which the order was granted shewed he was landlord or entitled to the possession, and in his notice of claim he claimed title to the possession under a deed from Patrick and Michael Dunigan, as well as under a deed from Patrick alone, and he proved at the trial a deed from the two Dunigans to him, made in 1858. The plaintiffs rested their proof of title upon the judgment and *fi. fa.* against Patrick, and the deed from the sheriff in January, 1873, and a deed from the sheriff's vendee to plaintiff, made 2nd March, 1874, also proving that the premises had been in the possession of Patrick, the execution debtor; and they called the defendant Hicks to prove that he went into possession under a lease or instrument made by Patrick to him,

dated 7th January, 1873, and after the making of the sheriff's deed. The plaintiffs having thus made a *prima facie* case, the defendant in answer proved the conveyance to him of Michael and Patrick in 1858, prior to the judgment, &c., thus shewing no title in Patrick at the time of the judgment, *fi. fa.*, &c. The plaintiffs submitted they were not bound to rebut that title. The learned Judge was of that opinion, and that the plaintiffs were entitled to succeed as the case stood, and he entered a verdict for them.

No objection appears to have been urged at the trial that the defendant Dunigan, defending as landlord, was estopped from thus shewing title in himself at the time of the judgment, seizure, and deed from the sheriff.

On the argument of this rule, it was, however, contended by Mr. Armour that the defendant was not entitled to set up such a title or defence, as it was one that Hicks could not have set up.

Now Hicks was not in as a tenant under the plaintiffs. He went into possession under a lease made after the plaintiffs' grantor's title accrued, and a year before their own title, and it is quite consistent that Patrick may have acquired a new title to the possession, or that John Dunigan had become Hicks's landlord and entitled to the possession at the time the action was brought. Nothing appeared to shew that John was not Hicks's landlord, or to preclude him from shewing title in himself to defend Hicks's possession. A landlord has an absolute right to come in and defend, provided he makes out to a Judge that he is entitled to possession: *Butler v. Meredith*, 11 Ex. 85.

And as said by Platt, B., in that case, p. 98: Here the party has been admitted to defend, and what right is there to displace him or prevent him at the trial shewing title and the right of possession in himself?

It did not appear that the defendant John was setting up any defence inconsistent with Hicks's title as tenant; in fact, it appears on the Judge's notes that he was, in another action, suing Hicks as his tenant for rent. On the whole,

as the learned Judge held, upon the plaintiffs' counsel asking if it was necessary to rebut the defendants' title, that it was not, there must be a new trial without costs.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

SIMPSON v. HOWITT.

Rent—Acceptance of Note therefor—Agreement—Right to distrain.

The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to wait until it has been dishonoured.

The plaintiff being unable to pay his rent in arrear, defendant, his landlord, proposed to him to go to the bank, and that defendant would endorse his note for the amount, on which defendant could get the money, defendant saying that if the plaintiff could not pay it in full at maturity he would renew. This was done, and defendant by discounting the note, which was not due until March, obtained the money. The bank already held other notes given for previous rent. In January, however, the notes being still in the bank, the defendant distrained. *Held*, that this evidence shewed that defendant obtained the notes upon an express agreement that his right to distrain should be suspended until they were dishonoured; and that the distress therefore was not warranted.

REPLEVIN: The defendant avowed for \$800 rent due under a demise. The case chiefly turned on the 4th, 5th, and 6th pleas.

Fourth plea, on equitable grounds, as to the sum of \$400, parcel, &c., that before the said time, &c., on the 3rd of November, 1875, that plaintiff by his promissory note, promised to defendant or order, three months after the date thereof, \$400, parcel of the sum alleged to be due for rent, with certain interest thereon, and delivered the note to the defendant, and the defendant received the note for and on account of the said sum of \$400, parcel, &c., and the defendant endorsed the note to the Canadian Bank of Commerce, who became and were at the time when &c., the holders of the said note. And as to the residue of the sum, alleged to be due for rent, that before the said time when,

&c., on the 7th of December, 1875, the plaintiff made his other promissory note, and promised to pay plaintiff or order, at a certain time which had not elapsed at the said time, &c., viz., three months after the date thereof, \$400, the residue of the said sum alleged to be due for rent, and delivered the note to the defendant, and the defendant received the note for and on account of the said sum of \$400, &c. And the defendant then afterwards duly indorsed the note to the Canadian Bank of Commerce, who became and were at the said time, &c., the holders of the note.

Fifth plea: that at the request of the defendant the plaintiff made similar notes, and that the defendant received the notes in satisfaction and discharge of the rent.

Sixth plea, on equitable grounds: that after the rent in the avowry mentioned became due and payable the plaintiff, at the request of the defendant, made and delivered to the defendant the promissory notes of the plaintiff, payable to the order of the defendant, for the full amount of the said rent; and thereupon, in consideration thereof it was then agreed by and between the plaintiff and the defendant, that the defendant should not by distress or otherwise enforce, or attempt to enforce, payment of the said rent until the promissory notes or any promissory note which should be thereafter given in renewal thereof should be dishonoured, and that at the said time when, &c., one of the said promissory notes, &c., for \$400 had become due and payable, and the other of the said notes, a note for \$400, had been dishonoured, and renewed, and the defendant had accepted and received the note given in renewal thereof, which note so given in renewal thereof had not become due and payable at the said time when, &c.

Upon these pleas issues were joined.

The cause was tried before Gwynne, J., at the last Spring Assizes at Guelph.

At the trial the following facts appeared: The plaintiff held under lease from the defendant certain premises at a rental of \$400 a year, payable half yearly, on the 25th of

March and 25th of September : that a short time before the distress in question, which was made on the 15th of January, 1876, the defendant saw the plaintiff and asked him if he could pay the rent then due, which he said was \$600, but that he would allow him \$200 for damages which the defendant's cattle had caused to the plaintiff. The plaintiff said that he did not think he could. The defendant then said "We will go to the bank, I'll endorse your note, and I can get the money." They went to the bank, where there were then two notes which had been given for rent, one due and the other not. It appeared the defendant had previously taken plaintiff's note for rent. The plaintiff then signed the note for \$400, dated 7th December, 1875, at three months, due March 10, 1876, and the defendant endorsed it, and got the money on it from the bank. The note overdue was for \$645, and it was then renewed for three months, falling due 9th of March, 1876; the other note in the bank was for \$439.75, falling due 4th of February, 1876. All the rent due on the 26th of September, 1875, was covered by these notes, and at the time of the distress they were all the property of the Bank of Commerce. The defendant stated that when the last note for \$400 was given it was understood that if the plaintiff was unable to meet it at maturity, or only in part, he promised to renew it. Before distraining the defendant made no demand of the rent, nor gave notice, nor assigned any reason for his distraining. The plaintiff swore that if he had had notice he would have endeavoured to have gotten the rent for the defendant.

Upon this evidence the learned Judge was of opinion the right to distrain was gone, and he entered a verdict for the plaintiff.

During Easter term, May 18, 1876, *M. C. Cameron*, Q.C., obtained a rule to set aside the verdict and to enter a nonsuit or verdict for the defendant, or for a new trial, on the ground that the verdict was contrary to law and evidence, and on the ground of the learned Judge holding as he did at the trial.

In this term, September 2, 1876, *Bethune*, Q.C., shewed cause, and cited *Davis v. Gyde*, 2 A. & E. 623; *Abrey v. Cruw*, L. R. 5 C. P. 37; *Young v. Austen*, L. R. 4 C. P. 533; *Keen v. Priest*, 4 H. & N. 236; *Hope v. White*, 22 C. P. 5; *Miller v. Miller*, 17 C. P. 226.

M. C. Cameron, Q. C., supported the rule, and cited *Simon v. Lloyd*, 2 C. M. & R. 187; *Betteshaw v. Buck*, 11 C. P. 12. He asked leave to add an additional replication.

September 26, 1876. MORRISON, J.—I am of opinion that the verdict was properly entered for the plaintiff. On the argument, no authority was cited in favour of the defendant. It was, however, contended that the taking of a note was no answer to the exercise of the defendant's right to distrain.

The facts, however, proved at the trial, supported the pleas of the defendant, and as the defendant took issue on them, the plaintiff, on the pleadings, was entitled to a verdict on those issues.

If they were no answer to the avowry, then the defendant should have demurred.

But with regard to the main question, the case of *Davis v. Gyde*, 2 A. & E. 623, is an authority to shew that the taking of a promissory note for rent in arrear, will not, until payment is actually made, operate as a satisfaction of the rent, or take away or even postpone the right of the landlord to distrain. But it seems to me that decision is subject to some qualification, such as the absence of an express agreement between the parties that the landlord, in consideration of receiving the note, would not avail himself of the other remedies until the maturity of the note and nonpayment by the maker. What are the leading facts in this case? The plaintiff's rent is in arrear. The defendant, his landlord, calls on him and enquires if he can then pay his rent. The plaintiff says he can not; the defendant says "We will go to the bank, I'll endorse your note for the amount of the rent, and in that way I can get the money." They go to the bank; the plaintiff gives his note at three

months; the defendant endorses it, and upon it the defendant gets the amount of his rent. By means of this note, and promissory notes given in like manner by the plaintiff, the defendant conditionally got all the rent due at the time of the distress. The notes were not payable until March. The defendant, without notice to the plaintiff that he repudiated the arrangement for any cause, or a demand of the rent, distrained on the 14th January, the notes then being in the hands of, and the property of the bank who discounted them.

In *Simon v. Lloyd*, 2 C. M. & R. 187 the defendant sent the plaintiff his acceptance, which was pleaded as being in satisfaction.

Parke, B., in giving judgment, said, at p. 189, referring to the acceptance: "That is a valuable consideration for an agreement by the plaintiff, that his right to sue should be suspended. It is, in effect, an agreement not to sue for a certain time, in consideration of receiving an authority to use the defendant's name for a certain amount, during the period of two months."

And in *Baker v. Walker*, 14 M. & W. 465 the defendant pleaded, to an action on a note, that he gave the note to the plaintiff on account of a judgment debt which the plaintiff had recovered against him, and the plea was held bad. During the argument *Davis v. Gyde*, 2 A. & E. 623, was referred to as shewing that the giving of a note did not suspend the right of distress until the note was due.

Parke, B., remarked, p. 467, "There was no averment there of any express agreement," and the learned Baron, in giving the judgment of the Court, says, p. 468: "A promissory note, although not a specialty, resembles a specialty, and at all events it is a security. Where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note. Here there being a judgment debt, a promissory note is given for the amount of it, and that is evidence

of an agreement to suspend the judgment until the note is due, which is a sufficient consideration to support an action on the note."

That case is an authority in favour of the plaintiff's contention, viz., that there was an agreement on the part of the defendant that his right of distress should be suspended during the currency of the notes. The making of the notes at the request of the defendant for his accommodation, and the defendant obtaining the money from the bank on them, his promise to the plaintiff that if at maturity he could not pay them that he would renew them, with the other circumstances detailed in the evidence, form in my judgment strong evidence that the defendant obtained the notes and discounted them upon the express agreement that his right to use his remedy by distress was at least suspended and postponed until they fell due and were not paid. The only reasonable inference to be drawn from the facts in favour of the landlord is, that he received the note, discounted it, and so obtained the amount of his rent for the time being, upon the understanding that if the note was not paid at maturity he might then resort to his remedy by distress.

I may here remark, that at the time the defendant distrained, the plaintiff was not only liable to the defendant for the amount of the note, but he was also liable to the Bank of Commerce, and the defendant had his rent in his pocket. I don't think it necessary to inquire whether or not the defendant had an equitable right to avoid or stay the distress. I think on the whole the rule should be discharged. During the argument the defendant asked leave to add a replication of fraud. I see no ground for doing so.

HARRISON, C. J., and WILSON, J., concurred.

Rule discharged.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 39 VICTORIA, TO TRINITY TERM, 40 VICTORIA.

ADMINISTRATION OF JUSTICE ACT.

"Purely money demand."]—See CHOSE IN ACTION, ASSIGNMENT OF.

Power of Court to enter verdict or nonsuit.]—See CORPORATION, 1.

Transference to Chancery—Purely money demand.]—See COVENANTS FOR TITLE, 2.

New trial refused on the ground that an objection open on the pleadings was not allowed at the trial.—See INSURANCE, 5.

New trial refused for the rejection of evidence though admissible.]—See BARRISTER.

AGENT.

See LANDLORD AND TENANT.

ASSAULT.

Coverture.]—In an action for assault brought by a married woman, the coverture, if not pleaded, forms no ground of objection to the verdict.—*Soules v. Doan*, 337.

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ATTACHMENT OF DEBTS.

Order to pay—Assignment of debt.]—Orders upon a garnishee to attach and to pay over were set aside, on its being shewn that the debt in question had been assigned by the garnishee before the judgment creditor had obtained his judgment; but no costs were given, as the assignees had neglected to give notice of the assignment to the garnishee.—*Grant v. McDonell*, 412.

ATTORNEYS & SOLICITORS.

1. *Misconduct—Application against.*—On an application against an attorney to answer the matters in affidavits, the Court, upon the affidavits set out in the report was not satisfied that the relation of attorney and client ever subsisted between the attorney and the applicants, though he had acted as attorney for a firm of which one of them was a member, nor that there was such professional misconduct as to require further action; there had been also a long delay in making the application, which was not satisfactorily ac-

counted for ; and the rule therefore was discharged. It appeared, however, that while acting as attorney for the assignee in insolvency of the firm, he had attempted as a creditor of the firm to secure a preference for himself. Such conduct was strongly censured, and the rule under the circumstances discharged without costs.

The authorities and practice as to such applications reviewed.—*In re Attorney*, 171.

2. *Statute of Limitations—Part payment—Acknowledgment.*]—The plaintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by the statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them the plaintiff told him or his clerk that he had credited it against his, the plaintiff's account, to which defendant assented. In 1875 the plaintiff wrote to defendant, sending his account and asking for payment, and stating that he had credited defendant's account rendered. The defendant's clerk answered repudiating the claim.

Held, 1. That there was no evidence of any payment on account to take the case out of the statute, there being no act on *defendant's part* amounting to payment; and, 2. That the letter if it had contained any acknowledgment would have been inoperative, not being signed by defendant himself.—*Ball v. Parker*, 488.

See BARRISTER.

BARRISTER.

Witness.]—The senior counsel for the plaintiff at the trial, a partner of the attorney above mentioned, offered himself also as a witness for the plaintiff, to corroborate the evidence of his partner, but was rejected, the learned Judge saying that he must choose between the positions of advocate and witness, and must cease to act as counsel if he desired to give evidence. *Held*, that he was a competent witness, and could not properly be rejected ; but a new trial was refused upon this ground, under 37 Vic. ch. 7, sec. 34, the Court being of opinion that no substantial wrong or miscarriage had been occasioned thereby.

Remarks upon the impropriety of such evidence, though strictly admissible.—*Davis v. Canada Farmers' Mutual Ins. Co.*, 452.

See LANDLORD AND TENANT.

BILLS AND NOTES.

Distress.]—Taking a note does not take away the right to distrain.—*Simpson v. Howett*, 610.

See CHATTEL MORTGAGE, 1.

BONUS.

To aid Railway.]—*See RAILWAYS AND R. W. Co.'s*, 1.

BOUNDARY.

See SURVEY.

BRIDGES.

See WAYS, 2.

BRITISH NORTH AMERICA
ACT.

Remarks as to the proper functions of a legislative body and the division of legislative power under this Act.—*Re Hamilton and North Western R. W. Co. and the Municipal Corporation of the County of Halton*, 93.

BY-LAW.

Confirmed by Statute after moved against—Costs in such case.]—See MUNICIPAL CORPORATION, 1.

See PUBLIC SCHOOLS, 2—WAYS, 5.

CARRIERS.

Construction of conditions on shipping note.]—See RAILWAYS AND R. W. Co.'s, 2.

CASE RESERVED.

See CRIMINAL LAW.

CERTIFICATE.

Of discharge of mortgage.]—See REGISTRY LAWS.

Of magistrate as to fire.]—See INSURANCE, 1, 5.

CHAMPERTY AND MAINTENANCE.

See CHOSE IN ACTION, ASSIGNMENT OF.

CHATTEL MORTGAGE.

1. *Right of partner to give—Future liability—Application of*

Chattel Mortgage Act—Possession taken by mortgagee—Seizure by sheriff—Damages.]—One partner of a firm authorized the other to obtain an endorser, in order to raise money from a bank: *Held*, that if express authority was required, this empowered the partner to mortgage all the stock-in-trade of the firm to secure such endorser.

A chattel mortgage need not be under seal; and when it contains no re-demise, the mortgagee may take immediate possession.

A mortgage, given to secure the mortgagee against liability on notes to be endorsed by him, is valid at common law, and not being provided for by the Chattel Mortgage Act, C. S. U. C. ch. 45, is excluded from its operation, and not avoided by it.

The mortgagee having taken possession of the goods, they were seized by the sheriff, under an attachment against one of the partners as an absconding debtor, and afterwards delivered by the sheriff to the assignee in insolvency of such partner. *Quere*, whether the sheriff was entitled to question the mortgage on behalf of creditors without proof of the debt on which the attachment was founded. In this case no such debt existed, for the note given for the debt was not due when the attachment issued. *Semble*, also, that the sheriff had no right to object that the notes secured by the mortgage were not properly stamped.

Held, also, that the sheriff had no right, either as representing the attaching creditor, or the assignee in insolvency of one of the partners, to take the goods out of the possession of the mortgagee: that he was liable for the full amount of the plaintiff's interest in them; and that

his having handed them over to the assignee could form no ground for reducing the damages.

But, a verdict having been rendered for that sum, it was made a condition, on refusing a new trial, that the plaintiff should assign to the sheriff his interest in the mortgage, so that the sheriff might, if possible, recoup himself.—*Paterson v. Maughan et al.*, 371.

2. *C. S. U. C. c. 45, s. 9—Removal of goods to another county—Omission to file there—Purchase with notice of the mortgage.*—Sec. 9 of the Chattel Mortgage Act, C. S. U. C. c. 45, provides that in the event of the permanent removal of the goods mortgaged into another county, a certified copy of the mortgage shall be filed in such county within two months from such removal, otherwise “the mortgage shall be null and void as against subsequent purchasers and mortgagees for valuable consideration, as if never executed.”

Held, that the words “in good faith,” found in secs. 3 and 4 of the Act, could not be imported into this section after “mortgagees”; and that a purchaser for value of the goods, though with notice of the mortgage, was entitled as against the mortgagee.—*Morrow v. Rorke*, 500.

CHEQUE.

Effect of, as payment.—See PAYMENT.

CHOSE IN ACTION, ASSIGNMENT OF.

Assignment of judgment and covenant—35 Vic. ch. 12, O.—*A. J. Act*, 1873, sec. 2—*Champerty and maintenance.*—One D. had recovered three

judgments against different persons, one in the County Court and two in the Queen's Bench. The defendants, being assignees of these judgments, received payment of and discharged the County Court judgment, and afterwards by deed assigned to one F. the said several judgments, covenanting that they had received no payment thereon, and had not released any part thereof. F. assigned to M. “the said several judgments,” and said assignment to him, “and all benefit to be derived therefrom, either at law or in equity.” And M., by deed, endorsed on the assignment to himself, assigned to the plaintiff “all his right, title, interest, and claim to and in the said several judgments referred to in the within assignment thereof.”

Held, MORRISON, J., doubting, that the plaintiff could, in his own name, sue the defendants on their covenant, either as assignee of the covenant under the 35 Vic. ch. 12, O., or as having an equitable right to enforce the covenant against defendants for a “purely money demand,” under sec. 2 of the Administration of Justice Act of 1873; and that it could not be said that there being no judgment to assign the covenant could not be assigned as incident to it, for defendants by their deed and covenant were estopped from asserting that the judgment had then been paid.

Held, also, that there was clearly no champerty or maintenance in the assignment from F. to M., or from M. to the plaintiff.—*Cole v. Bank of Montreal*, 54.

See ATTACHMENT OF DEBTS.

COMMISSION.

On Sale of Land.—See SALE OF LAND.

COMPASS.

Variations of.—See SURVEY.

CONTRACT.

Rescission of.—See STOPPAGE IN TRANSITU.

CONTRACTORS.

Employed by Municipal Corporation—Liability of corporation for negligence—See MUNICIPAL CORPORATIONS, 2.

CONTRIBUTORY NEGLIGENCE.

See WAYS, 1.

CONTROVERTED ELECTIONS.

See PARLIAMENTARY ELECTIONS.

CORONER.

Inquisition—Uncertainty—Other objections.—A coroner's inquisition on the body of P. M. found that S. G. on, &c., at, &c., "did feloniously and maliciously kill and slay one P. M., against the peace of our lady the Queen, her crown and dignity, in self defence of him, the said S. G., without malice or intent to kill."

Held, that it must be quashed, on the application of S. G., as not disclosing with certainty any criminal offence on his part.

Semble, that it was also a fatal objection that twelve jurors did not concur in the finding.

The Christian and surnames of all the jurors need not be appended to

the inquisition where they are given in the body of it.—*Regina v. Golding*, 259.

CORPORATION.

1. *Employment of clerk—Corporate seal—Verdict of jury, effect of*—37 Vic. ch. 7, sec. 33.]—A resolution passed by defendants, that the plaintiff be engaged for the society's office as a clerk, "at three months, on trial, at a salary of \$800 per annum."

Held, clearly, not to support a count alleging his employment for a year.

Held, also, looking at the statutes incorporating defendants, C. S. U. C. ch. 53, 37 Vic. ch. 50 D., the duration and character of plaintiff's employment, and the circumstances of his appointment, as set out in the report, that the contract, so far as executory, must be under the defendants' corporate seal.

A cheque operates as payment until it has been presented and payment refused. In this case, on the evidence set out, it was held the plaintiff had received the cheque as payment; and the jury having found otherwise a new trial was granted.

37 Vic. ch. 7 sec. 33—the A. J. Act, 1874—does not empower the Court to enter a nonsuit or verdict except in cases where before the Act the Court would have done so, on leave reserved.

Contra, where the trial is before a Judge without a jury: 33 Vic. ch. 7, sec. 6, O.—*Hughes v. The Canada Permanent Loan and Savings Society*, 221.

2. *Expulsion of member—Action therefor—Libel—Privileged commun-*

nication.]—The plaintiff being a member and a Vice-President of the Commercial Travellers' Association, incorporated by 37 Vic. ch. 96, D., was charged with using abusive language towards the president and other members, and with improper conduct at a meeting of the directors. A committee of seven was appointed, of whom the plaintiff chose three, to investigate these charges, and four of the committee made a report finding the charges proved. This report was adopted by the association, and the directors afterwards passed a resolution expelling the plaintiff. The plaintiff appealed to the next general monthly meeting, which decided to let the appeal drop, and to sustain the action of the directors: but at a subsequent general meeting the resolution of expulsion was rescinded. The railway companies had been notified by the defendants of the plaintiff's removal, by which he was compelled to pay higher fares than if he had been a member.

The plaintiff published a paper purporting to be on behalf of the association, in which the whole matter was discussed in an address from himself, and very offensive and violent language was used towards the president and other members; and the directors, in reference to this, passed a resolution repudiating the publication as being on behalf of the association, and censuring the plaintiff in strong language for its appearance. The plaintiff having sued the association for the expulsion, and for the libel contained in the resolution.

Held, that the plaintiff could not recover: that the expulsion by the directors, without having themselves tried the matter, and without notice to the plaintiff, was informal and

void: that the plaintiff therefore was not expelled, as alleged, so that there was no cause of action therefor: that any loss sustained was the loss of his employers, not his own; and that the alleged libel was privileged.—*Cuthbert v. The Commercial Travellers' Association of Canada*, 578.

Liability of corporation on parol contract—See INSURANCE, 6.

COSTS.

Recovery of, as damages.]—See COVENANTS FOR TITLE.

Counsel Fees on Election Trials.]—See PARLIAMENTARY ELECTIONS, 3.

See PUBLIC SCHOOLS.

COUNSEL.

See BARRISTER.

COUNSEL FEES.

See PARLIAMENTARY ELECTIONS, 3.

COVENANT.

To clear and fence—Construction — Forfeiture — Waiver.]—The lessee covenanted to clear up and fence five acres each year, and to split and put up into fences 500 rails each year to fence said land cleared by him; and there was a right of re-entry on breach. This number of rails would not nearly fence five acres. *Held*, that the covenant was satisfied by clearing five acres each year and fencing it with a fence of some kind—in this case a brush fence—having in it 500 rails.

Held, also, that the clearing need not be in blocks of five acres; and that defendant having finished clearing three acres which had been chopped by the plaintiff, part of a larger field, but was unfit for cultivation without logging, burning, &c., and fenced it on one side so as to form a lane which was required between this fence and an old fence there before, and having cleared more than two acres elsewhere, had complied with the covenant.

Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; for the difficulty of construing the covenant is a special circumstance entitling the defendant to relief.

Mere knowledge of, or acquiescence in, an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements, or some positive act of waiver, such as receipt of rent.—*McLaren v. Kerr*, 507.

Absence of covenant to pay in mortgage.—See FRAUDS, STATUTE OF.

COVENANTS FOR TITLE.

1. *For quiet enjoyment—Costs of defending suit—Right to recover.*—The defendants having conveyed land to T. with full covenants, T. mortgaged to the plaintiffs. The children of T. filed a bill in Chancery against the plaintiffs and others, under which a decree was made directing the plaintiffs to convey the land to the plaintiffs named in the bill, who shewed a good title as against both plaintiffs and defendants herein; and

the plaintiffs thus lost the land, and were obliged to pay their own and the plaintiffs' costs in the suit in Chancery.

The plaintiffs thereupon sued the defendants upon the covenant for quiet enjoyment contained in their deed to T: *Held*, that they were entitled to recover all the costs incurred by them in defending the Chancery suit, either as between party and party, or as between attorney and client, it not appearing upon the evidence that such costs were either needlessly or unreasonably incurred.—*The Trust and Loan Company of Upper Canada v. Covert*, 327.

2. *Deed and mortgage book—Action on covenants in the deed*—A. J. Act, 1873, s. 2.]—The plaintiffs sued defendants on their covenant for title in a conveyance of land to the plaintiff, alleging as the breach, that at the time of the execution of the deed, one H. was possessed of part of the land under a demise from defendants, on which part was a stone wall, whereby the plaintiff was unable to build on said wall, and his premises were injured. The defendants pleaded that the plaintiff had reconveyed the land to them by way of mortgage, with the usual covenants for title, which was still in force and unpaid. The plaintiff replied, on equitable grounds, that the mortgage provided for possession by him until default, and that no default had been made. *Held*, on demurrer, that the action could not be maintained, nor transferred to the Court of Chancery, under sec. 2 of the Administration of Justice Act, 1873, not being for a purely money demand.—*Kavanagh v. The Corporation of the City of Kingston*, 415.

CRIMINAL LAW.

1. *Quære.*—Whether on an indictment for obstructing a highway tried on the civil side, and a verdict for the crown, the verdict can be entered for the defendants on leave reserved. The proper course is to reserve a case under C. S. U. C. ch. 112.—*Regina v. Fitzgerald*, 297.

See CORONER—JUSTICE OF THE PEACE.

DAMAGES.

Where sheriff seized goods covered by chattel mortgage.—See CHATTEL MORTGAGE.

Loss of profits that might have been made on saw logs lost by defendant's negligence.—See EVIDENCE, 4.

See MUNICIPAL CORPORATIONS, 3.

DEBENTURES.

Sinking fund for—Appropriation of interest upon.—See MUNICIPAL CORPORATIONS, 4.

DEFAMATION.

Privileged communication.—See CORPORATION, 2.

DEMURRER.

See INSURANCE, 5.

DISTRESS.

1. An action for distraining for more rent than is due, cannot be maintained without a tender of the

sum which is really due; and the excess paid cannot be recovered back as money had and received.

Semble, that an infant may make a warrant of distress.—*Owen v. Taylor*, 358.

2. *Rent—Acceptance of note therefor—Agreement—Right to distrain.*—The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to wait until it has been dishonoured.

The plaintiff being unable to pay his rent in arrear, defendant, his landlord, proposed to him to go to the bank, and that defendant would endorse his note for the amount, on which defendant could get the money, defendant saying that if the plaintiff could not pay it in full at maturity he would renew. This was done, and defendant by discounting the note, which was not due until March, obtained the money. The bank already held other notes given for previous rent. In January, however, the notes being still in the bank, the defendant distrained. *Held*, that this evidence shewed that defendant obtained the notes upon an express agreement that his right to distrain should be suspended until they were dishonoured; and that the distress therefore was not warranted.—*Simpson v. Howitt*, 610.

DEPARTURE.

In pleading.—See INSURANCE, 2.

EASEMENT.

Right of way.—See WAYS, 3.

EJECTMENT.

Title.]—In ejectment the plaintiffs claimed under a deed from the sheriff. Defendant J. D., by leave of the Court, defended as landlord of H., the other defendant, and besides denying the plaintiffs' title, claimed under a deed from M. D. and P. D.

The plaintiffs proved judgments and executions against P. D. and M. D., and a sheriff's deed thereon on 3rd January, 1873, to F., who conveyed to the plaintiffs in 1874. H., being called by the plaintiffs, proved that he occupied under P. D., under a lease made by him on January 7th, 1873, and that P. D. had been on the lot several years; but a deed was proved from M. D. and P. D. to defendant J. D., dated and registered in 1858.

Held, that this deed shewed title out of P. D., the execution debtor, under whom the plaintiffs claimed, at the time of the judgment and execution: that the defendant J. D. was entitled to set up such defence; and that it was necessary for the plaintiffs to rebut the title thus shewn.—*Jex et al. v. Hicks et al.* 606.

By the Crown—Defence of possession against—See LIMITATIONS, STATUTE OF, 1.

See LIMITATIONS, STATUTE OF, 2.

ELECTIONS.

See PARLIAMENTARY ELECTIONS.

ESTATE TAIL.

See WILL.

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ESTOPPEL.

See LIMITATIONS, STATUTE OF, 2, 3.

EVIDENCE.

1. *Action by administrator—Interested party—Corroborative evidence*—36 Vic. ch. 10, sec. 6, O.—*Statute of frauds.*]—The plaintiff, as administrator, sued upon defendant's alleged promise to execute a mortgage to the testator on certain land, in consideration that the testator would discharge a mortgage which he then held thereon, so as to enable defendant to give a first mortgage on the land to one L. There was no evidence of this promise but that of the plaintiff, who admitted that he was directly interested in the money sought to be recovered.

Held, that under 36 Vic. ch. 10, sec. 6, O., the plaintiff, being an interested party, and his evidence not corroborated, could not recover, either at law or in equity.

Held, also, that the alleged promise required to be in writing, as relating to an interest in land, and on this ground as well the plaintiff must fail.—*Stoddart v. Stoddart*, 203.

2. *Action for negligence—Evidence of negligence on other occasions—Admissibility of.*]—Action against the defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiffs' lumber and mills there were burned. The alleged negligence consisted in leaving the screens of the steamer open; and on the part of the plaintiffs, evidence was received, though objected to, that on other occasions, at different

times and places, the screens were open, and cinders had escaped. The engineer and firemen on the boat, being afterwards called for the defendants, swore that the screens were closed, and had never on any occasion been left open. The learned Judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of the defendants' witnesses.

Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted; and the jury having found for the plaintiffs, a new trial was granted without costs.—*Edwards et al. v. The Ottawa River Navigation Company*, 264.

3. *Subpœna from L. C.—Consol. Stat. C. ch. 79—Non-attendance.*]—Where a subpœna issued under Consol. Stat. C. ch. 79, out of the Superior Court of Lower Canada, had not the statement or notice required by sec. 7. *Held*, that the witness could not be punished, under sec. 8 for non-attendance.

Held, also, that in this case, on the facts set out in the report, it sufficiently appeared that the witness was a resident of Toronto. *Semble*, also, that payment of conduct money to the witness was sufficiently shewn, the money appearing to have been paid with a previous subpœna also disobeyed.—*Re Darling*, 339.

4. *Saw logs—Loss of by defendants breaking the boom—Liability—Damages—Loss of profits.*]—The plaintiffs had a large quantity of logs boomed in a river, and while there a drive of about 5,000 logs, belonging to one C., came past without

injuring the boom, which was strong and well constructed. Defendants had a large number of logs boomed above the plaintiffs', some of which were let down at night, and in the morning were found in a jam against the plaintiffs' boom. This jam was broken up, and more of defendants' logs were let down, soon after which the plaintiffs' boom was found broken, the plaintiffs not being present, and their logs gone. They went down the stream with defendant's logs, and some were afterwards found, but about 125,000 feet were lost, and there was evidence tending to shew that they had been taken by defendant's men to a point about twenty miles away. There was evidence also that defendant's conduct was unreasonable in making their drive when and as they did.

Held, that there was evidence for the jury that defendants had broken the plaintiffs' boom by the undue pressure of their logs; and that defendants were liable without proof that they had actually used or cut up the plaintiffs' logs; and a verdict for the plaintiffs' was upheld.

Held, also there being no evidence that the plaintiffs could have purchased other logs at the time and place where the wrong was done, that they were entitled to recover the loss of profits, which the jury found they would have made out of the logs lost by defendants' misconduct.—*Auger et al. v. Cook* 537.

Admissibility of counsel in the cause as witness also.]—See BARRISTER.

Proof of title out of plaintiff in ejectment.]—See EJECTMENT.

Rejection of.]—See BARRISTER—TRESPASS, 3.

Right of witness to refuse to answer.—See SEDUCTION.

Admissibility of field notes of deceased surveyor.—See SURVEY, 2.

See CORPORATION 1.—INSURANCE
—MERCANTILE AGENCY.

EXCESSIVE DAMAGES.

See MALICIOUS PROSECUTION, 1.

EXECUTION.

Authorized to issue by the former attorney after he became a judge, action for.—McQuade v. Lizars, 215.

FALSE IMPRISONMENT.

See JUSTICE OF THE PEACE, 2.

FIELD NOTES.

Of Surveyor.—See SURVEY, 2.

FIRE.

From spark from steamer.—See EVIDENCE, 2.

FORFEITURE.

See COVENANT.

FRAUDS, STATUTE OF.

1. An administrator sued upon an alleged promise of defendant to execute a mortgage to the testator on certain land in consideration that testator would discharge a mortgage which he then held thereon, so as to enable defendant to give a first mort-

gage on the land to one L. Held that the alleged promise required to be in writing as relating to an interest in land.—Stoddart v. Stoddart, 203.

2. Mortgage—Absence of covenant to pay—Verbal promise to pay, on the mortgagee waiting for two months—Possession.]—Defendant, having purchased land from the plaintiff for \$6,000, paid \$600 down, and gave a mortgage for the balance of \$5,400, \$400 of which was to be paid on an event specified, \$1,000 within three months and the remaining \$4,000 in three equal payments in six, nine, and twelve months from the date of the mortgage; but the mortgage contained no covenant to pay. The first payment of \$600 was made, and afterwards, in consideration of the plaintiff forbearing to take any proceedings on the mortgage for two months, defendant promised to pay the \$1,000 then overdue. The plaintiff, having waited accordingly, and left the plaintiff in possession for that time sued upon this promise.

Held, WILSON, J., dissenting, that he could not recover, for that the promise, which was verbal, was a contract for an interest in land, within sec. 4 of the Statute of Frauds; and that if it amounted to a lease, it was not one within sec. 2, so as to be good without writing.

Per WILSON, J.—The agreement was a demise, and within sec. 2, and the \$1,000 promised to be paid might for this purpose be treated as rent reserved for the two months.—Jackson v. Yeomans, 280.

Representation as to credit.—See MERCANTILE AGENCY.

See SALE OF LAND.

HIGHWAYS.

See WAYS.

HUSBAND AND WIFE.

In an action for assault brought by a married woman, the coverture, if not pleaded, forms no ground of objection to the verdict.—*Soules v. Doan*, 337.

INFANT.

An infant may make a warrant of distress.—*Owen v. Taylor* 358.

INFORMATION.

Form of, for false pretences.]—*See* JUSTICE OF THE PEACE, 1.

INQUISITION.

By Coroner.]—*See* CORONER.

INSOLVENCY.

See CHATTEL MORTGAGE—STOPPAGE IN TRANSITU.

INSURANCE.

Magistrate's certificate—Want of seal—Reasonable time.]—The policy contained a condition requiring persons sustaining loss by fire to forthwith give notice thereof in writing, and as soon after as possible to deliver a particular account of the loss, stating various particulars specified; and in case of buildings or other fixed property, to accompany said statement by the certificate of a builder, &c. "They shall also produce a certificate under the hand

and seal of a magistrate," &c., "and certificates are produced, the loss shall not be payable."

Defendants, after setting out this condition in their plea, alleged that although the plaintiff, as soon as possible after the fire, made the statement of his loss and damages according to the condition, yet he did not as soon as possible after said fire, nor for more than eight months thereafter, produce to defendants such a certificate under the hand and seal of a magistrate, as required by the condition.

At the trial, it appeared that the fire occurred on the 19th April, 1874. On the 10th May an affidavit of loss was sent in, accompanied by a certificate under the hand, *but not* under the seal, of a magistrate, and on the 4th January, 1875, a second certificate under the magistrate's seal was delivered to the company. The jury, under the direction of the Judge, having found for defendants on this plea,

Held, 1. That the condition requiring a seal was not unjust nor unreasonable.

2. That the words "as soon after as possible" did not apply to the magistrate's certificate, which was required to be produced only within a reasonable time.

3. *Semble*, that the question of reasonable time here, there being no facts in dispute, was for the Court; and under 37 Vic. ch. 7, sec. 33, the jury having found for the plaintiff on all the other issues, and the motion being to enter a verdict for the plaintiff on the evidence, the Court held that the second certificate was produced within a reasonable time, and entered a verdict for plaintiff on this issue.—*Cammell v. Beaver and Toronto Mutual Fire Ins. Co.* 1.

2. *Pleading—Departure—Account of loss.*—The declaration, after setting out a condition of the policy, that the assured sustaining loss should within fourteen days deliver in a particular account thereof, &c., averred the performance of all conditions precedent.

Defendants pleaded that the plaintiff did not within fourteen days after the loss deliver in the account. And in another plea, that he did not although reasonably required, make proof by his declaration and books of account, &c.

The plaintiff replied to the first plea, that the policy was not delivered to him until long after the fire and that within fourteen days after receiving it he delivered the account; and to both pleas, that he delivered an account, and that defendants afterwards made further requisitions, which were complied with, and defendants never notified him in writing that the proof was objected to because not given in time.

Held, on demurrer, replication bad, as being a departure from the declaration. — *Coulthard v. Royal Ins. Co.*, 409.

3. *Assignment of policy—Mortgage*—38 *Vic. ch. 65 sec. 1.*—The plaintiff, on the 10th of September, 1874, insured with the defendants on a barn and stable \$100; on the produce, farming implements, &c., from time to time stored therein, \$400; and on horses and live stock, \$300. The policy was assigned by the plaintiff absolutely on the 27th January, 1875, with the defendants' consent, to the Loan and Agency Company, who had a mortgage on the land on which the barn and stable stood for \$400, but no claim to the chattels, and the actual nature of their interest in the policy was

not mentioned in the assignment, nor notified to the defendants until after the fire which took place on the 12th of July, 1875. A correspondence, set out in the case, took place between the defendants and the company, as a result of which the defendants paid to the company the \$100 insured on the buildings.

The declaration alleged that the plaintiff was interested in the properties to the amount insured at the time of making the policy, and until and at the time of the loss; that having mortgaged the land on which the said properties were situate to the Loan and Agency Company, to secure certain money advanced, he, with the defendants' consent, assigned to said company all his interest in the policy: that the property insured was burned, whereby said company became entitled to recover the amount of said loss: that all things happened to entitle them to sue therefor: that defendants paid to them the \$100 insured on the building, but no more: and that afterwards the company assigned to the plaintiff the policy and all causes of action thereon. Defendants pleaded, that the said Loan and Agency Company were not at the time of the loss interested in the chattel property as owners or otherwise.

Held, that the plaintiff could not recover, for the Loan and Agency Company had not at the time of the loss any interest in the goods; and that there was nothing in the correspondence above mentioned, or in the dealings between the different parties, stated in the case, which made it inequitable in defendants to set up this defence, so as to entitle the plaintiff to relief under the 38 *Vic. ch. 65, sec. 1, O.*

Defendants also pleaded that the encumbrance to the Loan and Agen-

cy Company was created by plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent, who took the plaintiff's application for insurance, also obtained the loan for him: that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing; and that after the fire defendants were told by the company that they had a claim only to the \$100 insured on the buildings, which they sent to him by letter. *Held*, that defendants' sending the money by letter was a written consent to the encumbrance; and that their assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment.

Defendants also pleaded false swearing by plaintiff in his affidavit of loss in stating that he had effected no additional insurance. *Held*, that the sworn claim of the plaintiff for loss made upon a policy with another company was admissible, without producing the policy; but that upon the evidence, set out in the case, it did not sufficiently appear that the same property was insured by both companies.

Quere, whether an affidavit as to other insurances is an affidavit in relation to the loss or damage.—*Hazzard v. Canada Agricultural Insurance Co.* 419.

4. *Double insurance.*]—The plaintiff having effected an insurance with defendants on his "stock, manufactured and in process, used for the manufacture of agricultural machinery," afterwards insured with another company his "agricultural machinery

in process of construction, finished and unfinished."

Quere, whether the defendants' policy extended to finished machines, or only to parts, finished or unfinished, of machines yet in process of construction, but

Held, that the second policy covered, at all events, a part of the property included in the first, and that there was therefore a double insurance.

Held, also, that the construction of the policy, under the circumstances, was for the Court, not the jury.

The plaintiff, when he insured with the other company, was told by the agent, who was also the plaintiff's local agent, that he would give notice of it to the defendants; but it was sworn that this agent had no authority to receive notice of further insurances.

Held, that this was clearly no notice of or consent to the second insurance, as required by 36 Vic. ch. 44, sec. 37, 38, O.—*Billington v. The Canadian Mutual Fire Ins. Co.*, 433.

5. *Certificate of nearest magistrate—Reasonable condition*—36 Vic. ch. 44, sec. 33; 38 Vic. ch. 65, sec. 1, O.—*Pleading.*]—The policy of a mutual company required a certificate of the loss, &c., under the hand of the magistrate or notary public most contiguous to the place of the fire; and there was a plea that the plaintiff had not furnished such certificate, on which issue was joined. The plaintiff at the trial applied for leave to reply: 1. That it was by accident or mistake that it was not furnished; 2. That defendants did not within a reasonable time object to the proofs as regarded this certificate; and 3. That the condition was unreasonable.

It appeared that the certificate furnished was by a magistrate of another county, who had not enquired into the circumstances; that there were suspicions as to the fire; and that the two nearest magistrates would not have given the necessary certificate. The learned Judge, after hearing this evidence, refused to add these replications, and found as a fact that it was not by accident or mistake the certificate was not furnished, but that the plaintiff refrained from applying to the proper magistrates because he knew they would refuse.

Held, that under 36 Vic. ch. 44, sec. 33, O., the plaintiff might insist that the condition was unjust or unreasonable without specially pleading it; but that it was clearly not unjust or unreasonable; and the Court, under the Administration of Justice Act, sec. 34. refused a new trial on the ground that the objection was not allowed at the trial.

Semble, that a demurrer is the proper mode of raising the question.

Held, also, that the non-compliance with the condition was not excused under 38 Vic. ch. 65, sec. 1, the omission to give the certificate not having been caused by necessity, accident, or mistake, and the statement or proof of loss not having been given in good faith. A nonsuit was therefore upheld.

The facts relied upon to bring the case within that section must be pleaded.—*Morrow v. Waterloo County Mutual Fire Ins. Co.*, 441.

6. *Limitation of action—Waiver of condition—Prevention of suit by negotiations—Corporation—Liability on parol contract.*—It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants

thereon after the lapse of one year from the loss, this being a condition also prescribed by the 36 Vic. ch. 44, sec. 54, O., relating to mutual fire insurance companies.

The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count, that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending; and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff \$500 in full, which they had not paid.

The fire took place on the 18th August, 1874. The claim papers were sent in on the 15th September. On the 28th October, the plaintiff was required to produce his books, invoices, vouchers, &c. He then placed his claim in the hands of an attorney, who wrote to defendants, and was told that without the books there could be no settlement. On the 26th February, 1875, he authorized certain creditors of his to settle the claim as they might think

proper. These creditors employed other attorneys, who wrote to defendants on the 10th April, threatening a suit, after which defendants' general manager called on them, and had an interview "without prejudice," in which he made an offer of \$500, which was not then accepted. On the 20th April, the attorneys wrote to the manager offering to take \$800, and saying that unless the claim was settled at once they would sue on the policy. On the 26th April, the board met, when this offer was declined; and the manager, who was called by the plaintiff, swore that this decision of the board was at once communicated to the attorneys. Nothing more took place until 18th September, when the attorneys wrote accepting the offer of \$500. The defendants took no notice of this or of a subsequent letter of the 15th November; and this action was brought on the 9th December. One of the attorneys, who was also junior counsel for the plaintiff at the trial, being called as a witness, swore that a few days after the letter of the 20th April the manager called on them, talked of a settlement, for which he seemed anxious, and said that if two other companies interested would each pay \$100 more defendants would do so as well. One of the attorneys denied notice of the resolution refusing their offer of \$500, but admitted that the manager told him then that defendants declined it. No mention was made of the limitation clause during the negotiations.

Held, that there was no evidence to go to a jury either of the agreement alleged, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent the defendants from insisting on the forfeiture.

Semble, that defendants could not be bound by the agreement alleged to pay the \$500, unless under their corporate seal.

Review of the cases as to the liability of a corporation by parol, both at law and in equity.—*Davis v. The Canada Farmers Mutual Insurance Company*, 452.

7. *Statement of loss—Party to sue—Property insured.*—A policy was effected in the name of H. and D., then partners. After the fire, and two months after the making and delivery of the statement of loss, D. assigned all his interest in the policy to H.

Held, that the action was properly brought, and the statement of loss made, by H. alone.

Held, also, that the statement of loss, set out in the case, and sworn to by the plaintiff only, was sufficient.

The statement was required by the condition to be given within thirty days. The fire was on the 11th August, and the statement was not sent until the 25th September, but the delay was occasioned by the delay of the company's agent to send a blank form for the purpose, as he had promised: *Held*, sufficient.

Semble, that at all events the delay of a few days would not, under the condition, avoid the policy.

Paper bags for flour burned in the mill, were held not to be covered by a policy upon tools.—*Hutchinson v. Niagara District Mutual Fire Insurance Company*, 483.

See LANDLORD AND TENANT.

INTEREST.

On sinking fund.—See MUNICIPAL CORPORATIONS, 4.

JUDGE.

Finding of, where no jury—Effect of.—See CORPORATION, 1.

JURY.

Effect of verdict of.—See CORPORATION, 1.

JUSTICE OF THE PEACE.

Action against J. P.—Information for false pretences—Form of—Objections to—Remand, liability for—Reasonable and probable cause.—The plaintiff was brought before defendant and another magistrate, on the 2nd of January, 1875, under a summons issued by defendant, on an information, that he did, on, &c., “obtain by false pretences from complainant the sum of five dollars contrary to law,” omitting the words “with intent to defraud,” which by the statute is made part of the offence, 32–33 Vic. ch. 21, sec. 93, D.

The prosecutor and another witness, T., were examined, and their statements shewed that the plaintiff sold some wood to the prosecutor, on a certain lot, telling him that some other parties had drawn it out, but that it was his, and if there was any trouble about it he would stand between the prosecutor and all danger: that the prosecutor paid him five dollars on account, and was afterwards prevented from drawing away the wood by one W., to whom T. swore it belonged; and that the plaintiff had offered to return the five dollars, which the prosecutor refused, because the plaintiff would allow nothing for the use of his team. W. was absent, and the prosecutor asked for an adjournment, which

was granted until the 5th. Defendant offered to take bail for plaintiff's appearance then, but the plaintiff refused to give it, saying “Send me to gaol,” and defendant ordered the constable to take him into custody. The constable thereupon put him in the lock-up, which was not a proper place for the purpose, being very cold and uncomfortable, where he remained until the 5th. The constable, who acted as keeper of the lock-up, said defendant knew that prisoners remanded were confined there. On the 5th, W. appeared and was examined as a witness. The case was adjourned until the 7th, the plaintiff giving bail for his appearance then, and on that day the magistrates, having in the meantime consulted the county attorney, dismissed the case. The plaintiff having sued the defendant for malicious arrest, and for false imprisonment.

Held, that there was no cause of action on either ground, and a nonsuit was ordered; for 1. The defendant had jurisdiction, for the information might by intendment be read as charging the statutable offence; and if not, the plaintiff should have taken his objection before the magistrate, when the information might have been amended and re-sworn; and he was precluded from raising it in this action.

There was upon the evidence no want of reasonable and probable cause for what defendant had done; for though what the prosecutor complained of was a breach of contract, and the subject of an action, it might also support a criminal charge; the remand under the circumstances was authorized; and there was no proof of malice.

Held also, that the defendant could not be held liable for the

plaintiff's sufferings caused by the condition of the lock-up, for he had remanded him only, giving no express directions to put him there.—*Crawford v. Beattie*, 13.

2. *Warrant to witness to testify—False imprisonment*—32-33 *Vic. ch. 31, sec. 16, D.*—The plaintiff had laid information before the defendant, a magistrate, against G. for an assault, but afterwards decided not to proceed further. Defendant issued a summons, addressed to her, reciting the information, and requiring her presence on a day named, then and there to testify, &c., but she said she did not wish to go on; and on the same day she was arrested under a warrant issued by the defendant, which recited that she had refused to appear before him, and commanded her arrest "to answer to the charge, and to be further dealt with according to law." She was brought before defendant, but refused to go on with the charge and a friend paid the costs for her, when she was discharged. These proceedings were taken, the defendant said, in order to get the constable's fees,

Held, that defendant was liable in trespass, for the plaintiff was not bound to proceed with the charge; and defendant had no right to issue the summons under sec. 16 of 32-33 *Vic. ch. 31, D.*, or the warrant under sec. 17.—*Cross v. Wilcox*, 187.

LANDLORD AND TENANT.

Insurance company—Lease—Exclusion of lessee—Authority of agent.—The agent of an insurance company at Toronto negotiated for a lease to the plaintiffs, who were barristers, &c., of one flat of the

company's offices for three years at \$600 a year, and executed the lease on the part of the company, containing the usual covenant for quiet enjoyment and, and received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 P.M., thus excluding the plaintiffs after that hour, and the agent refused to let them have a key unless they got the caretaker to be present.

Held, that the company were responsible for this act of their agent, which was clearly a denial of the plaintiff's rights under the lease.—*MacLennan et al. v. The Royal Insurance Co.* 515.

See COVENANT — DISTRESS —
FRAUDS, STATUTE OF.

LEASE.

See COVENANT—FRAUDS, STATUTE OF, 2.

LIMITATIONS, STATUTE OF.

1. *Land vested in the Crown in trust.*—The Statute of Limitations does not run against the Crown, and it makes no difference that the land is vested in the Crown as trustee. Where, therefore, in ejectment by the Crown for land held as trustee, for the University of Toronto, under C. S. C., ch. 62, sec. 65, it appeared that defendant had had possession for twenty-seven years, the plaintiff was nevertheless held entitled to succeed. *Regina v. Williams*, 397.

2. In ejectment it appeared that William Wood, Jr., owning the land in question, left it in 1852 in possession of his father, the defendant; and that in 1859 he, in the presence and

with the consent and approval of his father, mortgaged it to R., through whom the plaintiff claimed.

Held, that defendant could not, as against the plaintiff, set up any title founded on his possession before the execution of the mortgage. *Boys v. Wood*, 495.

3. Equitable plea setting up as an excuse for not bringing an action on a fire policy in time, that the plaintiff had been prevented by the conduct of the defendants.

Held, not supported by the evidence.—*Davis v. The Canada Farmers' Ins. Co.*, 452.

Part payment.—See ATTORNEYS AND SOLICITORS.

See INSURANCE, 6.

See TRESPASS, 2.

MALICIOUS ARREST.

See JUSTICE OF THE PEACE, 1.

MALICIOUS PROSECUTION.

Reasonable and probable cause—*Pleading*—*Information*—*Variance*—*Excessive damages.*—The declaration for malicious prosecution alleged that defendant charged the plaintiff with having unlawfully and maliciously set on fire the defendant's premises. The information produced at the trial, was, that defendant's premises were set on fire, that he had reason to believe that they were set on fire by the plaintiff; and prayed that she might be held to answer "the said charge." A verdict having been rendered for the plaintiff for \$1,000:

Held 1, on the facts stated in the report that there was evidence of want of reasonable and probable cause.

2. That the declaration, after verdict, though not sufficiently precise, might be held to import a crime.

3. That there was a variance between the declaration and evidence, the information not charging any crime; and *Quere*, whether if amended to suit the information the court could be good.

The Court, considering the damages excessive, allowed the insertion of a count in trespass in lieu of that in case, if the plaintiff would consent to reduce the verdict to \$300; and, if not, granted a new trial on payment of costs, with leave to the plaintiff to amend. *Munroe v. Abbott*, 78.

See JUSTICE OF THE PEACE, 1.

MANDAMUS.

To deliver over bonus debentures to R. W. Cos.—See RAILWAYS AND R. W. Cos., 1.

See PUBLIC SCHOOLS, 1.

MASTER AND SERVANT.

See CORPORATION, 1.

MEASURE OF DAMAGES.

For breach of covenant for quiet enjoyment.—See COVENANT FOR TITLE.

See JUSTICE OF THE PEACE, 1—MALICIOUS PROSECUTION—MERCANTILE AGENCY.

MEMORANDA.

MERCANTILE AGENCY.

Representation as to credit—Action for—C. S. U. C. ch. 44, sec. 10—Measure of damages—Evidence.]

The plaintiff, a merchant in Toronto, sued defendants upon an alleged contract on their part to furnish to the best of their ability information of the mercantile standing and credit, in the communities wherein they respectively resided, of the plaintiff's customers among the merchants and traders throughout the United States and Canada, concerning whom the plaintiff should have occasion to make inquiry, in order to aid the plaintiff in determining the propriety of giving credit, &c.; alleging that he desired to ascertain the mercantile standing and credit of one W., living in Toronto, who had applied to him to purchase goods upon credit; that thereupon it became defendant's duty to exercise ordinary care and ability in ascertaining the same, and to report truly to the plaintiff the result of such inquiries: that on the 14th June, 1875, defendants reported to the plaintiff that W. had stock about \$10,000, and \$5,000 or \$6,000 in his business, and claimed to be worth \$7,000: that his character and habits were good: that he was doing a fair trade; and that his credit was good locally. Whereupon the plaintiff, believing and acting on the said report, sold goods to W. to the value of \$500; whereas W. was insolvent at the time of making the report, and on the 8th July, 1875, absconded, without paying the plaintiff.

It was proved that defendants were a trade protective society, to whom the plaintiff paid an annual subscription: that he sent a clerk for information as to W., who had applied to purchase goods from him on credit: that defendants' clerk read to this

clerk out of a book the information above mentioned: that the plaintiff, twelve days after, without making any further inquiries, sold to W. \$500 worth of goods on credit; and that W. soon after that absconded. The jury found that defendants did not furnish this information to the best of their ability, and that the plaintiff did not act imprudently in not making further enquiries, though living in the same place with W.

Held, that the plaintiff could recover although the representation was verbal only, for that the action was brought not by reason of the representation, but by reason of defendants' neglect to use due care, and for a breach of their contract.

Held, also, that the plaintiff, under the circumstances, was entitled to recover the full sum for which credit was given, though the amount of the proposed credit was not mentioned to the defendants on making the enquiry.

Held, also, that the word "customer" would include intending as well as actual customers.

The Court, though not agreeing with the verdict upon the evidence, refused to interfere on that ground.]—*McLean v. Dun et al.*, 551.

MONEY HAD AND RECEIVED.

See DISTRESS.

MORTGAGE.

Absence of covenant to pay.—*See* FRAUDS STATUTE OF, 2.

See CHATTEL MORTGAGE—INSURANCE, 3—PARTNERSHIP.

MUNICIPAL CORPORATION.

1. *By-law—Statement of debt—Statute confirming by-law—Costs.*]—A rule *nisi* having been obtained to quash a by-law, the Legislature by a statute declared the by-law valid, and the rule was afterwards argued on the various objections taken, in order to decide who should pay the costs of the application. The municipality were ordered to pay them, on the ground that the debt of the town was not truly stated in the by-law.

Per WILSON, J.—In future in such cases the rule should not be argued; and it would be well to direct in the statute that the petitioners to confirm the by-law should pay all proper costs incurred in any application to quash it.—*Re Holden and the Corporation of the Town of Belleville*, 88.

2. *Damage done during construction of sewer — Independent contractors—Liability of corporation for.*]—The defendants contracted with B. and A. for the construction of a brick sewer on Yonge street, under a contract which provided that the work should be done according to the directions and to the satisfaction of defendants' engineer, who had power if the contractors should not proceed according to the contract or to his satisfaction, to complete the work at their expense. During the work the city engineer visited it frequently, superintending, and two inspectors for defendants were there constantly, to see that the specifications were carried out. In order to get rid of the water coming down, it was dammed back to raise it to the level of another sewer which was used as an outlet, and in consequence of heavy falls of rain the water thus penned

back overflowed into the plaintiff's cellar. It was contended that the work being carried on by independent contractors defendants were not liable, but *Held*, otherwise, for the work was done under defendants' control and supervision: and *Quere*, whether the defendants could transfer such a work, so as to escape liability.—*Grassick et al. v. The City of Toronto*, 306.

3. *Refuse deposited in street—Liability of city corporation—City commissioner.*]—Under the orders of the city commissioner of the City of Toronto, large quantities of rubbish and offal, offensive and injurious to health, were during the summer deposited in a lane adjoining the plaintiff's cottages, by which the lane was raised three or four feet, coming up to the windows, and the filth ran over into the basement; the well attached to the houses was rendered unfit for use, so that the plaintiff was compelled to dig a new one, and he had also to raise one of the houses, and remove the kitchen, to suit the level of the lane; his tenants refused to remain, and he was obliged to lower the rent.

Held, that the defendants were liable for the acts of the commissioner, without any by-law being shewn; but that the expense of raising the house and removing the kitchen could not be recovered.

When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. Remarks as to the form of the second count in this case.

The power given by sec. 425, subsec. 1, of the Municipal Act of 1873, to improve, repair, widen, and alter streets, includes the power when necessary for these purposes

to level, raise, or lower the streets.
—*Lewis v. The Corporation of the City of Toronto*, 343.

4. *Debentures—Sinking fund.*]—
The deposit of interest and sinking fund required the payment of debentures of a municipal corporation in a bank at interest, is a temporary investment of such money under sec. 248, sub-sec. 4, of the Municipal Act of 1873; and the corporation has no power by resolution to appropriate interest arising from such investment to any other purpose than the sinking fund.—*Re Barber and The Corporation of the City of Ottawa*, 406.

Liability of municipality to contribute towards erection of a school-house in adjoining municipality.]—
See PUBLIC SCHOOLS, 3.

Duty of, to repair bridges]—See WAYS, 2.

Duty of, to repair bridge between townships.]—See WAYS, 5.

Mandamus to deliver debentures to R. W. Cos.]—See RAILWAYS.

See TRESPASS, 2.

NEGLIGENCE.

Evidence of, on former occasions.]—
See EVIDENCE, 2.

In a municipality in allowing telegraph poles to lie on a road.]—
WAYS, 1.

In construction of sewer.]—See MUNICIPAL CORPORATIONS, 2.

In care of the streets.]—See MUNICIPAL CORPORATIONS, 3.

NEW TRIAL.

For excessive damages unless plaintiff agreed to reduce the verdict.]—
See MALICIOUS PROSECUTION.

Granted, without costs, for misdirection in rejection of evidence.]—See SEDUCTION.

See INSURANCE, 5, 6.

NONSUIT.

When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited on the ground that they disclose no cause of action.—*Lewis v. The Corporation of the City of Toronto*, 343.

PAPER BAGS.

Not covered by a fire policy on "tools"]—See INSURANCE, 7.

PARLIAMENTARY ELECTIONS.

1. *Controverted election—Delay in trial*—38 Vic. ch. 10, secs. 1, 2, D.]—
The 38 Vic. ch. 10, sec. 2, D.] enacts "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem*, until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." The petition here was filed on the 12th December, 1874. Hilary and Easter terms, and the session of Parliament, took up three months and eleven days, so that,

under the Act, the six months would not expire until the 21st September, 1875. The trial having been fixed for the 10th August, the respondent's attorney consented, without prejudice, to adjournment, and on the 30th July an order was made postponing the trial until a Judge should be able to attend. On the 22nd December, 1875, the trial was fixed for the 18th January, 1876, and afterwards by consent postponed till 2nd February.

Held, that the trial need not be commenced within six months in order to authorize a postponement, but that the commencement may be postponed beyond that time.

The Glengarry election, 12 L. J. N. S. 117, not followed.

But under the facts more fully stated in the report, it was held that the long delay was not warranted; and all further proceedings were stayed.—*Re Addington Election — Waggoner v. Shibley*, 131.

2. *Controverted election*—37 Vic. ch. 10, D.—36 Vic. ch. 28, D.—*Petition irregularly filed—Fixing day of trial.*—“The Dominion Controverted Elections Act, 1874,” 37 Vic., ch. 10, repealed “The Controverted Elections Act, 1873,” 36 Vic., ch. 28, under which the Election Court existed, except as respected elections held before the passing of the first-mentioned Act, and directed all elections in future to be tried in this Court.

The petitioner, on the 6th of February, 1875, filed his petition under the last Act, but entitled “In the Election Court,” the notice of filing and of the deposit and other papers being entitled in the same Court, and delivered it to the Clerk of the Crown, who was the clerk both of

the Election Court and of this Court. Afterwards, on the 28th of August, an order was made setting aside the notice of trial given entitled in this Court, on the ground that no petition was filed in this Court and by a rule of the Election Court the petition was taken off the files of that Court, on the ground that the Court had no jurisdiction to try a petition under the Act of 1874. The petitioner then, on 20th November, 1876, applied to this Court to fix a day for the trial, which was refused, for 1. There was no petition in this Court; and 2. If it had been at first well filed, the trial was not commenced within six months from its presentation, and no application made within the time to postpone it.—*Re Kingston Election, Stewart v. McDonald*, 139.

3. *Trial — Counsel fees — Taxation.*—At the trial of an election petition, and on appeal from the judgment, the petitioner, a barrister, appeared in person, but was assisted by a junior counsel. On taxation, the petition having been dismissed, counsel fees were charged, to first counsel at the trial \$300, and to second counsel \$150; and on argument of the appeal, to first counsel \$150, second counsel \$100. The Master disallowed fees to the first counsel, but allowed \$200 to the second counsel at the trial, and the \$100 on appeal; there being no affidavit of payment or receipt for such fees, though it was called for and insisted upon for the respondent. On application for revision: *Held*, 1. That the fees should not, under the circumstances, have been allowed without proof of payment. 2. That no more than \$150 should have been taxed for the second counsel at the trial. A revision

was therefore ordered, with an intimation that the \$150 and \$100 might be allowed on satisfactory proof of payment.—*Re North Victoria Election, Cameron v. Maclean*, 147.

PARTNERSHIP.

Held, that a partner authorized to obtain an endorser to a note, to raise money from a bank for the firm, has power to mortgage the stock-in-trade to secure the endorser.—*Peterson v. Maughan*, 371.

See INSURANCE, 7.

PATHMASTER.

See TRESPASS.

PAYMENT.

A cheque operates as payment until presented and payment refused.—*Hughes v. Canada Permanent Loan and Savings Society*, 221.

PERPETUITY.

See WILL, 1.

PLEADING.

In an action on an insurance policy the facts relied on to bring the case within 38 Vic. ch. 65 sec. 1, must be pleaded. but under 36 Vic. ch. 44, sec. 33, O., the plaintiff may insist that the condition is unjust or unreasonable without specially pleading it.—*Morrow v. The Waterloo Co. M. F. Ins. Co.* 441.

Departure in.—See INSURANCE, 2.

PRACTICE.

As to calling on attorneys to answer matters in affidavits.—See ATTORNEYS AND SOLICITORS.

As to coroner's inquisition.—See CORONER.

As to entry of verdict or nonsuit by the Court after trial by jury and without jury, respectively.—See CORPORATION, 1.

Irregular filing of election petition.—See PARLIAMENTARY ELECTIONS, 2.

Taxation of counsel fees.—See PARLIAMENTARY ELECTIONS, 3.

PRINCIPAL AND AGENT.

See LANDLORD AND TENANT.

PUBLIC SCHOOLS.

1. *Board of Education—Constitution and powers*—37 Vic. chs. 27, 28, O.—*Mandamus to raise money for high school purposes—Demand.*—Upon the affidavits and facts stated in thereport a mandamus nisi was ordered, on the application of the Joint Board of Education of the Town of Perth, commanding the corporation of the Town to provide \$16,000, as required by said Board, for the maintenance and accommodation of the High School, to pay for a school site and building of a school house and premises connected therewith, as shewn by the estimates prepared and submitted by said board to the corporation.

It was *held* that the Joint Board of Education were the proper applicants, and not the Trustees of the High School Board.

The sections of the High School and Public School Acts, 37 Vic. ch. 27, 28, O., which confer on the joint board the powers of each board, mean the powers possessed by each board for the purpose for which such board was created, before the creation of the joint board.

Semble, that the demand here was not in form sufficient: but the council having resisted the application on other grounds effect was not given to the application.—*Re Board of Education of the Town of Perth and the Corporation of the Town of Perth*, 34.

2. *Distribution of school funds*—37 Vic. ch. 28, sec. 48, subsec. 4; sec. 153 O.—A township by-law enacted that the interest arising on the invested funds for schools in a township should be apportioned on and according to the number of days the schools had been open or taught in each half year. It was objected that the by-law was one made under the 37 Vic. ch. 28, sec. 48 subsec. 4, O., which did not authorize this method of apportionment. The Court refused to quash the by-law, as the effect of so doing, under the facts stated in the case, would be to place the apportionment as provided by earlier by-laws and resolution, and in effect produce no change, and moreover the municipality, under sec. 153, could by another mode do what the by-law purported to do.

Quære, whether the money in question, having been specially appropriated by by-laws under the 20 Vic. ch. 71, was within the section 48 sub-sec. 4 above referred to.

The question raised being doubtful, the rule was discharged without costs.—*Re Storms and the Corporation of the Township of Ernestown*, 353.

3. *High schools*—37 Vic. ch. 27, O.]—*Held*, on rehearing, affirming the judgment of Wilson, J., 37 U. C. R. 529, that under 37 Vic. ch. 27, O., the High School Board for a district consisting of two municipalities, a town and a township, could call upon one of the municipalities, the township, to contribute towards the erection of a school house in the other municipality, and not merely towards its maintenance.—*Re Niagara High School Board and the Corporation of the Township of Niagara*, 362.

RAILWAYS AND R. W. CO.'S.

1. *Bonus*—*Mandamus to deliver debentures*.]—A railway charter provided that on receiving certain petitions the corporation of the county, &c., should submit to the electors a by-law to aid the company by a bonus, and should deliver to trustees the debentures for any such bonus when granted.

The company, as an inducement to the passing of such a by-law, gave a bond conditioned to build their road within a certain time, and to repay the bonus to the county in the event of their ceasing within twenty-one years to be an independent company. Under the facts of this case, set out below, the Court refused a mandamus to compel the corporation to hand over the debentures to the trustees appointed to receive them, there being ground for apprehension, owing to the delay, that the bond could not be performed; but the rule was discharged without costs, and without prejudice to a further application.

Remarks as to the remedy by mandamus, and the effect of there being another remedy available in equity,

though not at law. *Semble*, that it is the inadequacy, and not the mere absence of all other legal remedies, coupled with the danger of a failure of justice without it, which must usually determine the propriety of granting or refusing the writ.

Remarks as to the proper functions of a legislative body, and the division of legislative power under the B. N. A. Act.—*The Hamilton and North-Western R. W. Co. and the Municipal Council of the Corporation of the County of Halton*, 93.

2. *Carriage of goods—Condition—Construction.*]—The defendants received at Petrolia two car loads of coal oil to be carried to London. The shipping notes stated, "The G. W. R. will please receive the undermentioned property, to be sent subject to their tariff, and under the conditions stated above and on the other side," one of which conditions was, that defendants would not be liable for the loss or damage to goods of a combustible nature. One of the cars never arrived, and defendants could give no account of it; the other reached London, and was damaged there, as was supposed, and all the oil in it lost.

Held, that defendants were liable, for the condition related only to risk of carriage.—*Fitzgerald et al. v. The Great Western R. W. Co.*, 525.

REASONABLE AND PROBABLE CAUSE.

See JUSTICE OF THE PEACE, 1.—MALICIOUS PROSECUTION.

REASONABLE TIME.

Under 37 Vic. ch. 7 sec. 33, O, to comply with condition of policy.]—*See* INSURANCE, 1.

REGISTRY LAW.

The absence of the residence and occupation of the subscribing witness to a certificate of discharge of mortgage, on the face of the certificate, though stated in the affidavit: *Held*, clearly no objection, being cured by 36 Vic. ch. 17, sec. 8, O.—*Stoddart v. Stoddart*, 203.

REGULÆ GENERALES.

As to single Judges Court, under the Administration of Justice Act, 401—*As to the Marshal*, 404—*As to Trinity Term*, 1876, 405.

RENT.

See DISTRESS.

REPRESENTATION AS TO CREDIT.

Action for—C. S. U. C. ch. 44.]—*See* MERCANTILE AGENCY.

RESCISSION.

Of contract for sale of goods.]—*See* STOPPAGE IN TRANSITU.

RIGHT OF WAY

When it passes by Deed.]—*See* WAYS, 3.

RIVER.

See WAYS, 5.

SALE OF GOODS.

See CHATTEL MORTGAGE, 2. *Acceptance.*]—*See* STOPPAGE IN TRANSITU.

SALE OF LAND.

Action for commission—Right to recover—Statute of Frauds.—The defendant agreed with the plaintiff, an attorney, to give him \$1,000 for his trouble and commission, if he procured for him a certain hotel property for \$15,000. The plaintiff took an agreement from the vendor to sell to himself, and afterwards, with the vendor's assent, substituted one O., who acted for the plaintiff, for himself as vendee. The defendant and the vendor, through the instrumentality of the plaintiff, then came together, and the price was reduced to \$14,500. Deeds were made by O. and by the vendor to the defendant, who took possession, the plaintiff being employed by the vendor to prepare some of the papers, but he had not, as he swore, been employed by him to make the sale.

Held, that the plaintiff was entitled to recover : that the contract was not one within the Statute of Frauds ; and that his acting for the vendor after the contract of sale had been made, notwithstanding the agreement for purchase in the first instance to himself, was not open to any legal objection.—*White v. Curry*, 569.

See WAYS, 3.

SAW LOGS.

See EVIDENCE, 4.

SCHOOLS.

See PUBLIC SCHOOLS.

SEAL.

See CORPORATION, 1—INSURANCE, 1, 6.

SEDUCTION.

Evidence—Right of witness to answer.—In an action for seduction witnesses called for the defence testified to having had connection with the girl. The jury were told that these witnesses had a right to refuse to answer such questions : *Held*, a misdirection. *Held* also, that evidence of the girl's general bad character for chastity was improperly rejected.

The defendant, being called, wholly denied the charge, and the jury having found for the plaintiff, though the verdict was not lar e, a new trial was granted without costs, on the ground that the defendant might have been prejudiced by the misdirection and rejection of evidence. *McCreary v. Grundy*, 316.

SEWERS.

See MUNICIPAL CORPORATIONS, 2.

SHERIFF.

See CHATTEL MORTGAGE, 1.

SOLICITORS.

See BARRISTER.

STAMPS.

See CHATTEL MORTGAGE, 1.

STATUTES.

C. S. C., ch. 62, sec. 65]—*See* LIMITATIONS, STATUTE OF.

C. S. C., ch. 79, secs. 7, 8.]—*See* EVIDENCE.

C. S. U. C., ch. 44, sec. 10.]—*See* MERCANTILE AGENCY.

C. S. U. C., ch. 45.]—*See* CHATTEL MORTGAGE.

C. S. U. C., ch. 112.]—*See* CRIMINAL LAW—WAYS, 4.

C. S. U. C., ch. 126.]—*See* TRESPASS.

20 Vic. ch. 71.]—*See* PUBLIC SCHOOLS 2.

32-33 Vic. ch. 21, sec. 93.]—*See* JUSTICE OF PEACE, 1.

32-33 Vic. ch. 31, sec. 16 D.]—*See* JUSTICE OF PEACE, 2.

36 Vic. ch. 28 D.]—*See* PARLIAMENTARY ELECTIONS, 2.

37 Vic. ch. 10, secs. 1, 2 D.]—*See* PARLIAMENTARY ELECTIONS, 1, 2.

37 Vic., ch. 96 D.]—*See* CORPORATIONS, 2.

35 Vic. ch. 12 O.]—*See* CHOSE IN ACTION.

36 Vic. ch. 10, sec. 6 O.]—*See* EVIDENCE, 1.

36 Vic. ch. 17, sec. 8 O.]—*See* REGISTRY LAW.

36 Vic., ch. 44, secs. 33, 54, O.]—*See* INSURANCE, 5.

36 Vic. ch. 44, secs. 37, 38 O.]—*See* INSURANCE, 4.

36 Vic. ch. 44, sec. 54 O.]—*See* INSURANCE, 5.

37 Vic. ch. 7, sec. 6 O.]—*See* CORPORATION, 1—INSURANCE 1.

37 Vic. ch. 7, sec. 34 O.]—*See* BAR-ISTER.

37 Vic. ch. 12, sec. 17 O.]—*See* WAYS 2.

37 Vic. ch. 27, 28, O.]—*See* PUBLIC SCHOOLS, 1, 2, 3.

38 Vic. ch. 45, sec. 1 O.]—*See* INSURANCE, 2, 5.

STEAMBOAT.

Fire caused by.]—*See* EVIDENCE 2.

STOPPAGE IN TRANSITU.

Sale of goods—Insolvency of vendee—Acceptance—Right to rescind contract.]—R. & Co., sugar refiners at Montreal, in September sold 145

barrels of sugar to L. at Hamilton, on 60 days' credit. On the 27th November L. wrote to R. that he was unable to meet his acceptances, and on the 28th R. telegraphed to L. to know if he had received the sugar, and was answered that part had been received on the day before. Twenty barrels were received at L.'s warehouse on the 27th, and forty on the 28th from the R. W. Co. On the 30th, Monday, R.'s agent called on L. and asked him to transfer the sugar to S. & Co., of Hamilton, and one load was sent to them, when L. forbade the sending more, but about an hour afterwards he ordered the rest to be delivered, and fifty-nine barrels were sent, one barrel having been sold to a customer of L. On the 30th an agreement, prepared by L.'s solicitor, was signed by R.'s agent, reciting that the 59 barrels had been delivered to L., which R. wished to resell to others; and that it had been agreed, to avoid any question as to L.'s right to deliver to R. said 59 barrels, the others having been stopped in transitu, that R. should indemnify L. and his assignee, if any appointed, against all consequences of such delivery, in case a return thereof should be adjudged; and the agreement was to indemnify L. accordingly, and make good to him or his assignee the value of said sugar so to be delivered, if a return should be adjudged by a competent Court. L. made an assignment on the 5th of December, 1874, and on the 3rd February, 1875, the plaintiff the assignee, conveyed to Lamb & Co. all the estate.

L. being examined, swore that he had no intention of receiving the sugar into stock: that it was sent to his warehouse by the R. W. Co. without his knowledge or instructions: that he had previously in-

structed his manager not to receive any goods: that when he became aware that it had been sent he ordered it not to be taken into stock; and that the agreement signed was an afterthought, subsequent to his agreement with R.'s agent to take away the sugar, and after part of it had been removed. This was substantially corroborated by the agent. In an action by the assignee of L. against R., claiming to avoid the giving up the sugar as an unjust preference, and in trover:

Held, that the plaintiff could not recover: that whether there was strictly speaking a right of stoppage in transitu or not, the evidence warranted a finding that before the assignment in insolvency the contract of sale had been rescinded by both parties, which it was competent for them to do, the goods not having been actually accepted; and the goods therefore never passed to the plaintiff.

Semble, that the count as upon a fraudulent preference could not have been sustained; and *quere*, as to the plaintiff's right to recover, he having before action assigned the property to Lamb & Co.—*Mason v. Redpath*, 157.

STREET.

See MUNICIPAL CORPORATIONS, 2.

SUBPENA.

To Lower Canada—Non attendance on.—*See* EVIDENCE, 3.

SURVEY.

1. *Variations of compass.*—Defendant claimed under a timber license which described his limits as bounded on the south by "the con-

tinuation of a line from the head of Mud Lake on the course N. 54° E., formerly the boundary between T. C. and A. R. M." The plaintiff claimed under a license which gave his northerly limit as the same line, describing it also as running N. 54° E. Both licenses were renewals of previous licenses from about 1839.

Held, that the boundary between them was the true astronomical line N. 54° E.; and that the plaintiff could not claim according to a line run in 1874 N. 54° E. magnetically, making no allowance for the variations of the compass.—*Thibadeau v. Skead*, 387.

2. *Field notes of deceased surveyor—Admissibility of.*—The question in dispute being the boundary between lots three and four, the field notes of a surveyor, since deceased, of a survey made by him in June, 1827, for one B., were tendered in evidence; in which it appeared that he then found a post which he treated as an original post between these lots. B., as appeared by the entries in the registry office, became the owner of lot 2 in August, 1827, and of lot 3 in January, 1830.

Held, admissible,—if the survey were shewn to have been made for a person interested in it, of which there was evidence—as being an entry made in the course of business, and in the performance of a quasi public duty.—*O'Connor et al. v. Dunn*, 597.

TELEGRAPH POLES.

Liability of municipality for an accident caused by running over telegraph poles allowed to stay on a road.—*Castor v. Corporation of the Township of Uxbridge*, 113.

TITLE.

Proof of, in ejectment.] — See
EJECTMENT.

TRESPASS.

1. *Unauthorized issue of execution — Seizure thereunder.*] — An action of trespass will not lie against a person who without authority procures the issue of an execution on a judgment admitted to be valid and satisfied, and the seizure of plaintiff's goods thereunder.

To a declaration against L. and M., in trespass for taking plaintiff's goods defendants pleaded that one C. recovered a judgment in the County Court against the plaintiff, on which he, by defendant L. as his attorney, sued out a *fi. fa.*, which was returned *nulla bona*, and that afterwards, the judgment remaining in force and unsatisfied, defendant L. instructed defendant M. to and defendant M. did issue an *alias fi. fa.*, on which the plaintiff's goods were seized, which are the alleged trespasses. The plaintiff replied that defendant L., when he so instructed defendant M., was Judge of the County Court, and had ceased to be C.'s attorney, and had no authority from C. to issue the *alias fi. fa.* Defendants rejoined that the *alias fi. fa.*, at the time of the seizure, was in full force, and not then or at any time annulled or set aside.

Held, on demurrer, that the rejoinder was good.—*McQuade v. Lizars*, 215.

2. *Pathmaster—Opening streets—Limitation of action—C. S. U. C. ch. 126*]—Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down

the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land, made by a former owner, and found in the registry office; but it was not marked registered or filed, no sale was shewn to have been made according to it, and the streets had never been opened or used.

Held, that defendant was not acting within his jurisdiction, and was liable in trespass.

The act complained of was done on the 5th November, 1874, and the action was commenced on the 5th May, 1875; *Held*, in time.—*Crooks v. Williams*, 530.

3. *False imprisonment—Evidence to connect defendant—Rejection of evidence—Nonsuit.*]—In an action for arresting the plaintiff, who had been imprisoned on a charge of stealing trees, the magistrate who ordered the arrest was not called, nor the constable, nor was the warrant produced; and it was not shewn positively who was the prosecutor. It was shewn only that defendant claimed the land on which the timber was cut by the plaintiff; that he was at the investigation before the magistrate, and wanted the plaintiff to settle; and that afterwards, as the plaintiff was about being taken to gaol, the proposition to settle was renewed, and when the plaintiff refused, defendant told the bailiff, who had the plaintiff in the wagon, to drive to gaol.

Held, not sufficient to charge defendant with the arrest, or with its continuance.

Held, also, upon the facts stated in the report, that the refusal to receive evidence of the constable and another, when tendered, was a matter

in the discretion of the judge ; and that the non-suit, which was upheld, was not shewn to have been against the plaintiff's consent.—*Conway v. Shibly*, 519.

See JUSTICE OF THE PEACE, 2.

TRIAL.

Of election petition.—See PARLIAMENTARY ELECTIONS 1, 2.

TRUSTS AND TRUSTEES.

See LIMITATIONS, STATUTE OF, 1.

UNIVERSITY OF TORONTO.

See LIMITATIONS, STATUTE OF, 1.

VERDICT.

See CORPORATIONS, 1—CRIMINAL LAW.

WAIVER.

Of forfeiture.—See COVENANT.

WAYS.

1. *Highway—Obstructions caused by wrongdoers—Liability of corporations.*—Municipal corporations are responsible for damage caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge ; and the road is out of repair when, by the existence of such obstructions, it is rendered unsafe or inconvenient for travel.

In this case telegraph poles, intended for the construction of their

line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by one F. along the road in a sulky in the day time ; they had passed several of the poles safely, but both were at the moment looking at an object off the road, and the sulky running against a pole upset and injured the plaintiff. It was proved that the pathmaster knew of the poles being there. The Court being left to draw inferences as a jury :

Held, that the driver was guilty of contributory negligence, and that the plaintiff therefore could not recover, although the defendants would otherwise have been liable.—*Castor v. The Corporation of the Township of Uxbridge*, 113.

2. *Bridge in village—Liability of county to repair*—37 Vic. ch. 16, secs. 17, 18, O.]—The leading road through the county of Wellington, running north and south, crossed the Grand River in the village of Fergus by the Tower street bridge, less than one hundred feet in width, which was built in 1834, and by that bridge only till 1850, when another bridge, more than one hundred feet wide, was built by a private owner of property in the village over the river at St. David street, about three hundred yards from Tower street. After that the travel along the leading road was divided between the two bridges. The county never by by-law assumed either bridge, but had granted money to aid in keeping up both.

Held, (the facts being more fully stated in the case,) that the county was not bound to repair the St. David street bridge, under the 37 Vic. ch. 16, secs. 17, 18, O., as being a bridge "necessary to connect a

public highway leading through the county."—*Regina v. The Corporation of the County of Wellington*, 194.

3. *Right of way—When it passes by deed—Unity of possession—Representation.*]—B., owning land in fee, conveyed a part of it, on which were two houses, to the plaintiff, by a deed under the Act respecting short forms of conveyances, describing the premises as consisting of two houses, numbered 112 and 114, "and the appurtenances thereof," and by metes and bounds also, one of the courses extending westerly "to a lane produced, six feet wide, then south * * along the said lane," &c. This lane then existed over B.'s land, and was used as a means of access to the two houses. The plaintiff claimed title under B. by a subsequent conveyance, and was aware of the description in defendant's deed before he purchased. *Held*, that the right to use the way passed by the deed to defendant.

B., when he sold to defendant, represented that this lane was laid out for the use of the land conveyed, and on the faith of this defendant purchased: *Held*, that even if the right had not passed by the deed, the defendant would have been entitled to relief in equity against interference by B., or any one claiming under him.—*Adams v. Loughman*, 247.

4. *Indictment — Embankment — Obstructing highway.*] — About thirty-five years ago one S., with the assent of the then road commissioners, built a dam or embankment eighteen feet wide along the line of road, where there was a valley and creek, being allowed therefor five years' taxes and statute labour. This

embankment was used for the purposes of his mill and for the highway. Nothing was said as to who should keep it in repair, and statute labour was afterwards done upon it as elsewhere. The embankment having become too narrow and unsafe, the defendant, the owner, was indicted for putting the embankment on the highway, and permitting it to remain there, as an obstruction.

Held, that the indictment would not lie, for he could not, under the facts stated, be compelled to remove the embankment, though he might be required to remove any water collected on the highway there, and indicted for neglect to do so, or might be liable in a civil action for the injury thus done to the embankment.

Quere, whether upon such an indictment tried on the civil side, and a verdict for the Crown, the verdict can be entered for the defendant on leave reserved. The proper course is, to reserve a case under the statute, C. S. U. C. ch. 112.—*Regina v. Fitzgerald*, 297.

5. *Road between townships—Bridge—Duty to repair—Municipal Act of 1873, secs. 410, 413, 416.—"River."*]—A stream, called Black Creek, of from 30 to 40 feet in width, with clearly defined banks, crosses the road running between the townships of Ellice and Downie, and is crossed by a bridge on that road. The plaintiff sued the two townships for injury sustained by him in consequence of this bridge being out of repair. It appeared that the county council had assumed the road as a county road by a by-law, which, before the accident, had been repealed by another by-law.

Held, that under sec. 410 of the Municipal Act of 1873, in order to make the county liable, an existing by-law was necessary; and that, under sec. 416, the two townships were liable.

Held, also, following the previous judgment in this case, 37 U. C. R. 580, that Black Creek was not a river, within sec. 413.—*McHardy v. The Corporations of the Townships of Ellice and Downie*, 546.

[This Case has since been reversed on appeal].

Opening Streets.—See TRESPASS, 2.

See MUNICIPAL CORPORATIONS, 3.

WILL.

Remoteness—Perpetuity—Estate tail—Limitations.—A testator who died in 1849 devised as follows: "It pleased the Lord to give me two sons equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground and the quarter of an acre for a place of worship." (To Duncan his son, he gave his family Bible and 5s., above what he had done for him). "To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer state dues and public bindings himself and the lawful male offspring of his body until the proper heir come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber of whatever kind away off the land, or bringing any family on to it but his own. But if he leave a situation

so advantageous * * I appoint Peter McVicar, my grandson, to take charge of the place, farm and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions until the heir be of lawful age as aforesaid."

The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation, conveyed his interest to Peter McVicar named in the will. Neither of the testator's sons had any son born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar.

Held, *Wilson, J.*, dissenting, that Peter Ferguson did not take an estate tail under the doctrine of *cy-pres*; and that the principal devise to the unborn grandson being void for remoteness, the defendant, the heir-at-law, was entitled.

Per *Wilson, J.* The principal devise being void, Peter Ferguson took an estate in tail male; the limitation on such estate, in favour of the great grandson, being inoperative and void could not defeat it; and the plaintiff was entitled under his father by descent, or under his deed from McVicar, to whom his father had conveyed.—*Ferguson v. Ferguson*, 232.

WORDS.

"*River*,"—See WAYS, 5.

"*Customer*."—See MERCANTILE AGENCY.





